

PETITION FOR ZONING RE-CLASSIFICATION
SPECIAL EXCEPTION AND/OR VARIANCE

TO THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY:

The undersigned, legal owner(s) of the property situated in Baltimore County and which is described in the description and plat attached hereto and made a part hereof, hereby petition that the zoning status of the herein described property be re-classified, pursuant to the Zoning Law of Baltimore County, from an DR 5.5 zone to an R-16 zone, for the reasons given in the attached statement, and (2) for a Special Exception, under the said Zoning Law and Zoning Regulations of Baltimore County, to use the herein described property, for reasons stated in attached Memorandum.

and (3) for the reasons given in the attached statement, a variance from the following sections of the Zoning Law and Zoning Regulations of Baltimore County:

MAP 26
NOV 2-80
SECTION 2
DISTRICT 2
E/S 24th
TOWSON
BY: [Signature]
BY: [Signature]

Property is to be posted and advertised as prescribed by The Baltimore County Code.

I, or we, agree to pay expenses of above Re-classification, Special Exception and/or Variance, posting, etc., upon filing of this petition, and further agree to and are to be bound by the zoning regulations and restrictions of Baltimore County adopted pursuant to the Zoning Law for Baltimore County.

Contract Purchaser: (Type or Print Name) _____
Signature _____
Address _____
City and State _____
Legal Owner(s): Truman Grabill (Type or Print Name) _____
Signature _____
Address _____
City and State _____
Attorney for Petitioner: Robert A. DiCicco (Type or Print Name) _____
Signature _____
Address: 208 W. Penna. Ave. _____
Towson, Md. 21204 _____
City and State _____
Attorney's Telephone No.: 825-2000 _____
Name, address and phone number of legal owner, contract purchaser or representative to be contacted: _____
Contact attorney or owner at above nos. _____
Name _____
Address _____
Phone No. _____

IN THE MATTER OF THE PETITION FOR RE-CLASSIFICATION OF TRUMAN GRABILL BEFORE THE COUNTY BOARD OF APPEALS
E/s Rolling Rd., 2,600'N of Dogwood Road Case No. R-82-80

SUBPOENA

Please issue a Subpoena to the following named individual to be and appear before the County Board of Appeals on WEDNESDAY, DECEMBER 9, 1981, at 10 a.m. at Room 218, Courthouse, Towson, Maryland, to testify for the Petitioner:

Honorable James T. Smith, Jr.
Councilman - Third District
County Council of Baltimore County
Court House
Towson, Maryland 21204

COST \$ 5.00
SUMMONED 12/7/81
NON EST 19
NON SUT 19
COPY LEFT 19

ROBERT A. DICICCO
405 Central Avenue
Towson, Maryland 21204
825-2000
Attorney for Petitioner

Mr. Sheriff:
Please issue the above summons.

Jane Holmen, Board of Appeals

RE: PETITION FOR RECLASSIFICATION : BEFORE THE COUNTY BOARD OF APPEALS
from D.R. 5.5 to D.R. 16 Zone
E/S of Rolling Rd., 2600'
N of Dogwood Rd., 2nd District : Item 21, Cycle I
TRUMAN GRABILL, Petitioner

ORDER TO ENTER APPEARANCE

To the Honorable, Members of Said Board:
Pursuant to the authority contained in Section 524, I of the Baltimore County Charter, I hereby enter my appearance in this proceeding. You are requested to notify me of any hearing date or dates which may be now or hereafter designated therefore, and of the passage of any preliminary or final Order in connection therewith.

Peter Max Zimmerman
Deputy People's Counsel
John W. Hession, III
People's Counsel for Baltimore County
Rm. 223, Court House
Towson, Maryland 21204
494-2188

I HEREBY CERTIFY that on this 31st day of August, 1981, a copy of the foregoing Order was mailed to Robert A. DiCicco, Esquire, 208 W. Pennsylvania Avenue, Towson, Maryland 21204.

John W. Hession, III
People's Counsel for Baltimore County

IN THE MATTER OF THE PETITION FOR RE-CLASSIFICATION OF TRUMAN GRABILL BEFORE THE COUNTY BOARD OF APPEALS
E/s Rolling Rd., 2,600'N of Dogwood Road Case No. R-82-80

SUBPOENA

Please issue a Subpoena to the following named individual to be and appear before the County Board of Appeals on WEDNESDAY, DECEMBER 9, 1981, at 10 a.m. at Room 218, Courthouse, Towson, Maryland, to testify for the Petitioner:

Honorable James T. Smith, Jr.
Councilman - Third District
County Council of Baltimore County
Court House
Towson, Maryland 21204

ROBERT A. DICICCO
405 Central Avenue
Towson, Maryland 21204
825-2000
Attorney for Petitioner

Mr. Sheriff:
Please issue the above summons.

Jane Holmen, Board of Appeals

IN RE: PETITION OF TRUMAN GRABILL
ROLLING ROAD & HIDEY'S LANE
FOR RE-CLASSIFICATION AND
SPECIAL EXCEPTION

MEMORANDUM IN SUPPORT OF PETITION

Your Petitioner, through his attorney, Robert A. DiCicco, respectfully submits the following Memorandum in Support of his claim that the zoning requested should be granted because of an error in the zoning maps.

1. In support of his argument that there was an error in the original zoning maps, Petitioner contends that the present zoning of the tract, DR 5.5, which permits only single family residential dwellings, is completely inconsistent with the character of the neighborhood in that the property immediately west and across the street is zoned DR 16, on which there is constructed approximately eight hundred townhouses. The property is bounded on the north by a several hundred acre tract known as the Security Industrial Park, which is used for the full gamut of industrial purposes allowed under that zoned. For example, nearly a stones throw away is a larger Baltimore Gas & Electric Co. storage depot and sub station wherein is stored a dangerous substance known as PCB. In the light of the commercial uses of the land surrounding the subject property, it was grave error to zone the parcel for single family use.

2. The Council also committed error when it failed to consider that the Board of Appeals had, on November 6, 1979, granted a change in zoning for this parcel from DR 5.5 to DR 16, based upon error. Although the matter was appealed, as of the effective date of the current maps, December 11, 1980, the property was in fact zoned DR 16.

3. As an additional item of error, Petitioner submits that the Council failed to consider (a) that certain geological formations prohibit the use of the property for anything less than industrial or

LAW OFFICES
ASKEW, WILSON
& DICICCO, P.A.
TOWSON, MD. 21204

multi-family use; (b) that demographic and economic changes in the neighborhood prevent its use for single family dwellings or farming; and (c) the enactment of various county building ordinances and laws have so increased the cost of building single family or low density dwellings at the site that such use is economically prohibitive.

4. And for such other and further errors as will be disclosed by an indepth study of the area and as will be more fully developed at the time of the hearing on this Petition.

Respectfully submitted,

Robert A. DiCicco
208 W. Pennsylvania Avenue
Towson, Maryland 21204
825-2000

LAW OFFICES
ASKEW, WILSON
& DICICCO, P.A.
TOWSON, MD. 21204

-2-

IN THE MATTER OF THE APPLICATION OF TRUMAN GRABILL FOR REZONING OF property located on the E/S of Rolling Road, 2600' N. of Dogwood Road 2nd District
John W. Hession, III, Esq.,
People's Counsel for Baltimore County,
Appellant
File No. R-82-80
IN THE CIRCUIT COURT FOR BALTIMORE COUNTY AT LAW
Misc. Docket No. 14
Folio No. 148
File No. 82-M-143
CERTIFIED COPIES OF PROCEEDINGS BEFORE THE ZONING COMMISSIONER AND BOARD OF APPEALS OF BALTIMORE COUNTY

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now come William T. Hackett, Leroy B. Spurrier, and Patricia Phipps, constituting the County Board of Appeals of Baltimore County, and in answer to the Order for Appeal directed against them in this case, herewith return the record of proceedings had in the above entitled matter, consisting of the following certified copies or original papers on file in the office of the Zoning Department of Baltimore County:

ZONING ENTRIES FROM DOCKET OF ZONING COMMISSIONER OF BALTIMORE COUNTY

No. R-82-80

February 27, 1981 Petition of Truman Grabill, for reclassification from D.R. 5.5 to a D.R. 16 zone, on property located on the east side of Rolling Road, 2600' north of Dogwood Road, 2nd District, filed
April 29, 1981 Comments of Baltimore County Zoning Advisory Committee filed
November 19, 1981 Certificate of Publication in newspaper - filed
November 22, 1981 Certificate of Posting of property - filed
December 9, 1981 At 10:00 A.M. hearing held on petition.

Truman Grabill
Case No. R-82-80

April 29, 1982 Order of County Board of Appeals granting the reclassification from D.R. 5.5 to D.R. 16
May 19, 1982 Order for Appeal filed in Circuit Court for Baltimore County by John W. Hession, III, Esq., People's Counsel for Baltimore County
May 20, 1982 Certificate of Notice sent to all interested parties
May 19, 1982 Petition to accompany Order for Appeal filed in Circuit Court for Baltimore County
May 19, 1982 Petition for Extension of Time to file Transcript of Proceedings
July 1, 1982 Transcript of testimony filed

Petitioner's Exhibit A - Plat showing property

B 1 - Photo taken looking northeast from Grabill property
B 2 - Photo of Industrial Park
C 1 thru 6 - Series of Photos
D 1 - D 3 - Series of Photos showing townhouses
E - Official zoning map, Balto. County
F - Official zoning map, Balto. County
G - Aerial Map, dated 1977
H - Document - Paul Lee Engineering Co.
I - Letter to Mr. DiCicco from Councilman Smith
J - Tape used at Hearing
K - Nov. 6, 1979, Opinion from Bd. of Appeals
L - Judge Buchanan Decision, July 11, 1980
M - Letter from Court of Special Appeals, 11/19/80
N - Mandate from Court of Special Appeals, Nov. 19, 1980

People's Counsel Exhibit 1A thru 1K - Series of Photos

2 - Recommended 1980 Comprehensive Zoning Map
3 - Balto. County Council Log, 3rd District, 2 page exhibit

the Circuit Court for Baltimore County and two appeals to this Court.

Pursuant to the 1976 Comprehensive Zoning Map process, Grabill's property was zoned D.R. 5.5. Grabill petitioned the Baltimore County Board of Appeals to reclassify his tract to D.R. 16. The Board granted his request November 16, 1979, and the Circuit Court for Baltimore County affirmed July 11, 1979. The People's Counsel for Baltimore County (People's Counsel) appealed that decision to this Court. That appeal was dismissed November 19, 1980 as moot because in the interim, the Baltimore County Council considered Grabill's property as a specific issue during the 1980 Comprehensive Zoning Map process and reclassified it back to its original designation of D.R.5.5 after a visit to the site. Grabill again petitioned the Board for reclassification to D.R.16 instead of D.R.5.5. The Board again reclassified and this time the court reversed. It is this second petition with which we are concerned here.

The property itself is a 13.7 acre tract, with a dwelling and farm building, originally cultivated as farmland. It lies in the area east of Rolling Road and north of Dogwood Road in Western Baltimore County, located in the northwestern portion of a 100 acre quadrant zoned D.R.5.5.

corner of Rolling and Dogwood Roads. People's Counsel asserts contrary to Grabill that Security Square Mall, the two national motel chains, the industrial office park and the Quail Meadows Apartment complex are not close to the subject property, each located approximately one mile from the tract in question.

Both Grabill and People's Counsel agree that to the west of the quadrant, separated by Rolling Road is a substantial area of apartment complexes including the Kingswood Common Apartments, zoned D.R.16.

The basic issue before the County Board of Appeals under the Petition for Reclassification was whether there was error in the 1980 Comprehensive Zoning Map in designating the subject tract D.R.5.5.

The hearing before the Board took two full days to complete. For purposes of this appeal, the testimony and evidence before the Board can be summarized as follows:

Grabill produced testimony through expert witness Paul Lee, who had prepared a development cost estimate for public improvements for the theoretical maximum number of units allowed under the D.R.5.5 classification. He projected the cost to be \$9,100, assuming the need to provide a sewer connection. Lee believed that this figure coupled with building costs rendered the land infeasible for low density residential development. He added that his estimate might be lower than the true costs if the subject site was plagued with underground rock as suspected.

public service development costs per unit for residential development in Baltimore County averaged \$8,000.

Hagan's testimony was corroborated by Robert Morton of the Baltimore County Public Works Department, who introduced figures of recent public works agreements for subdivisions in Western Baltimore County.

Michael Flanagan, Assistant Traffic Engineer, presented evidence on the possible impact on the existing road system in the area should reclassification be granted.

Finally, County Planner James Hoswell established that based on his review of the site and its environs, the 1980 Comprehensive Map history, and the mix of uses in the neighborhood, D.R.5.5 zoning was proper for the subject site. He testified that while good planning theory favored high density residential zones as a buffer between low density residential zones and commercial or industrial zones, textbook models could rarely be achieved. Hoswell also expressed concern that reclassification might trigger a domino effect resulting in additional rezoning petitions in the area. Referring to the Council's consideration of the site, the witness' review of the Planning Board and Council's logs rebutted petitioner's contention that the County Council, as a matter of policy, adheres to prior Board of Appeals reclassification decisions, and

The Circuit Court for Baltimore County reversed the Board's decision. The trial court found that the Board had substituted its judgment of good planning for that of the County Council by finding error when the Council adopted the 1980 zoning map with Grabill's D.R. 5.5 designation. The court held that there was no evidence in the record to support a finding that the County Council's action amounted to a mistake that would warrant correction by reclassification:

Just because there is a dispute with the Council's conclusion does not constitute a showing of original mistake.

THE LAW

I. Whether the trial court erred in substituting its judgment for that of the Board where the issue before the Board was fairly debatable.

A. Cyclical Zoning

This second round of litigation was instituted because Truman Grabill, as a property owner, contested the 1980 Comprehensive Zoning Map promulgated by the Baltimore County Council. The Baltimore County Code, Section 22-21(2) et seq. requires the Council to adopt a county-wide zoning map every fourth year. In Coppolino v. County Board of Appeals of Baltimore Co., 23 Md. App. 358, 328 A.2d 55 (1974), this Court affirmed the presumption

Arundel County v. Maryland National Bank, 32 Md. App. 437, 361 A.2d 134 (1976); Balt. Cty. Code §2-58.1(j). The burden of demonstrating change or mistake is always upon the applicant, Agneslane v. Lucas, 247 Md. 612, 233 A.2d 757 (1967), and that burden is an onerous one. Cabin John Ltd. v. Montgomery County, 259 Md. 661, 271 A.2d 174 (1970). The applicant must present strong and convincing evidence to overcome the strong presumption of correctness attached to comprehensive zoning. Stratakis v. Beauchamp, 268 Md. 643, 304 A.2d 244 (1973).

B. Scope of Review

Maryland law dictates that where a legislative body or board of county officials has granted a rezoning of property, the question on judicial review is whether or not such action is arbitrary and discriminatory or fairly debatable. Trainer v. Lipchin, 269 Md. 667, 309 A.2d 471 (1973); Boyce v. Sembly, 25 Md. App. 43, 334 A.2d 137, (1975).

... It is not the function, duty or right of a court to zone or rezone, but only to determine whether the legislative body has properly applied the governing law to the facts. If there is room for reasonable debate as to whether the facts justify the municipal legislature in deciding the need for its enactment, it must be upheld. It is only when there is no room for reasonable debate, or a record barren of supporting facts, that the Court can declare the legisla-

The issue before this Court is therefore whether the trial court was clearly erroneous in reversing the Board's ruling based on the express reasons stated therein.

C. Mistake

Grabill asserts that the finding of mistake in the 1980 Comprehensive Zoning Map by the appeals board is supported by substantial evidence rendering the conclusion fairly debatable.

In Boyce v. Sembly, *supra*, the Court comprehensively set forth the concept of mistake in zoning law and judicial review of it:

It is presumed ... that at the time of the adoption of the map the Council had before it and did, in fact, consider all of the relevant facts and circumstances then existing. Thus, in order to establish error based upon a failure to take existing facts or events reasonably foreseeable of fruition into account, it is necessary not only to show the facts that existed at the time of the comprehensive zoning but also which, if any, of those facts were not actually considered by the Council ... Thus, unless there is probative evidence to show that there were then existing facts which the Council, in fact, failed to take into account, or subsequently occurring events which the Council could not have taken into account, the presumption of validity accorded to comprehensive zoning is not overcome and the question of error is not fairly debatable. ... (Emphasis supplied). 25 Md. App. at 51-52.

tion of correctness accorded to comprehensive zoning. There was un rebutted testimony by Paul Lee of the presence of underground rock, although such testimony cannot be given much weight. The opinion or conclusion of an expert or lay witness is not evidence strong or substantial enough to show error in a comprehensive rezoning unless the reasons given by the witness as the basis for his opinion, or other supporting facts relied upon by him, are themselves substantial and strong enough to do so. Stratakis v. Beauchamp, 268 Md. at 655, 304 A.2d at 250. Compare Bonnie View Country Club v. Glass, 242 Md. 46, 217 A.2d 647 (1966) (Expert Engineer testified as to existence of underground mine shafts after conducting several surveys and performing excavation on subject site).

In addition, there was testimony that development costs at D.R.5.5 were prohibitive *inter alia* because projects across the street from the Grabill property were selling for substantially less than those proposed for the subject site under the D.R.5.5 classification.

Grabill also offered testimony that the Council may not have carefully considered relevant information which existed at the time of the comprehensive zoning. However, in order to establish the Council's failure, there must be evidence to show that such information was not, in fact, or could not have been taken into account

II. Whether the D.R.5.5 zoning determination amounted to an unconstitutional confiscation.

As a separate issue, Grabill alleges that it was confiscatory to zone the subject tract D.R.5.5 because the property cannot reasonably be developed in that classification.

The general rule in Maryland is that to find an unconstitutional taking, the owner must affirmatively demonstrate that the legislative or administrative determination deprives him of all reasonable use of his property and that it cannot be used for any of the permitted uses in the existing zone. Stratakis v. Beauchamp, 268 Md. at 643, 304 A.2d at 244 (1973). It is not enough for the property owner to show that the zoning action results in substantial loss or hardship. Mayor and City Council of Baltimore v. Borinsky, 239 Md. 611, 622, 212 A.2d 508, 514 (1965).

In the case before us, the Board found that there was no confiscation, noting that the property could be developed under its present zone designation. The circuit court affirmed this determination. Even if the record could have supported a finding of confiscation, the Board did not so find. Our scope of review is limited to what the Board did find. We hold that the trial court did not err in reversing the Board's ruling based on the reasons therein expressed.

Truman Grabill
Case No. R-82-80

People's Counsel Exhibit 4 - Cycle Planning Board Review of
Petition

- " " " 5 - Letter dated Oct. 3, 1980, to James Smith from Robert DiCicco
- " " " A - Professional Resume of J. Carroll Hagan
- " " " B 1 thru 5 - Public Works Agreements
- " " " C - Selected Public Works Agreement and Cost

July 6, 1982 Record of proceedings filed in the Circuit Court for Baltimore County

Record of proceedings pursuant to which said Order was entered and said Board acted are permanent records of the Zoning Department of Baltimore County, as are the use district maps, and your respondents respectively suggest that it would be inconvenient and inappropriate to file the same in this proceeding, but your respondents will produce any and all such rules and regulations, together with the zoning use district maps at the hearing on this petition, or whenever directed to do so by this Court.

Respectfully submitted,

June Holmen
June Holmen
County Board of Appeals of Baltimore County

cc: Robt. A. DiCicco, Esq.
J. W. Hession, Esq.

IN THE MATTER OF
THE APPLICATION OF
TRUMAN GRABILL
FOR REZONING OF
property located on the
E/S of Rolling Road, 2600'
N. of Dogwood Road,
2nd District

IN THE
CIRCUIT COURT
FOR
BALTIMORE COUNTY
AT LAW

Misc. Docket No. 14

Folio No. 148

File No. 82-M-143

CERTIFICATE OF NOTICE

Mr. Clerk:

Pursuant to the provisions of Rule B-2(d) of the Maryland Rules of Procedure, William T. Hackett, Leroy B. Spurrier, and Patricia Phipps, constituting the County Board of Appeals of Baltimore County, have given notice by mail of the filing of the appeal to the representative of every party to the proceeding before it; namely, Truman Grabill, 2601 N. Rolling Rd., Baltimore, Md. 21207, Petitioner; Robert A. DiCicco, Esq., 405 Central Ave., Towson, Md. 21204, Counsel for Petitioner; and John W. Hession, Esq., Court House, Towson, Md. 21204, People's Counsel for Baltimore County, a copy of which Notice is attached hereto and prayed that it may be made a part thereof.

June Holmen
June Holmen
County Board of Appeals of Baltimore County
Pm. 230, Court House, Towson, Md. 21204
Telephone 494-3180

I HEREBY CERTIFY that a copy of the foregoing Certificate of Notice has been mailed to Truman Grabill, 2601 N. Rolling Rd., Balto., Md. 21207, Petitioner; Robert A. DiCicco, Esq., 405 Central Ave., Towson, Md. 21204, Counsel for Petitioner; and John W. Hession, Esq., Court House, Towson, Md. 21204, People's Counsel for Baltimore County, on this 20th day of May, 1982.

June Holmen
June Holmen
County Board of Appeals of Baltimore County

IN THE MATTER OF
THE APPLICATION OF
TRUMAN GRABILL
FOR REZONING OF
property located on the
E/S of Rolling Road, 2600'
N. of Dogwood Road,
2nd District

IN THE
CIRCUIT COURT
FOR
BALTIMORE COUNTY
AT LAW

John W. Hession, III, Esq.,
People's Counsel for Baltimore County,
Appellant

Misc. Docket No. 14

File No. R-82-80

Folio No. 148

CERTIFIED COPIES OF PROCEEDINGS BEFORE THE
ZONING COMMISSIONER AND BOARD OF APPEALS
OF BALTIMORE COUNTY

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now come William T. Hackett, Leroy B. Spurrier, and Patricia Phipps, constituting the County Board of Appeals of Baltimore County, and in answer to the Order for Appeal directed against them in this case, herewith return the record of proceedings had in the above entitled matter, consisting of the following certified copies or original papers on file in the office of the Zoning Department of Baltimore County:

ZONING ENTRIES FROM DOCKET OF ZONING COMMISSIONER
OF BALTIMORE COUNTY

No. R-82-80

February 27, 1981 Petition of Truman Grabill, for reclassification from D.R. 5.5 to a D.R. 16 zone, on property located on the east side of Rolling Road, 2600' north of Dogwood Road, 2nd District, filed

Order of William T. Hackett, Chairman, County Board of Appeals, directing advertisement and posting of property - date of hearing set for Wednesday, December 9, 1981, at 10:00 A.M.

April 29, 1981 Comments of Baltimore County Zoning Advisory Committee filed

November 19, 1981 Certificate of Publication in newspaper - filed

November 22, 1981 Certificate of Posting of property - filed

December 9, 1981 At 10:00 A.M. hearing held on petition

494-3180

County Board of Appeals

Room 219, Court House
Towson, Maryland 21204

May 20, 1982

John W. Hession, III, Esq.
People's Counsel
Court House
Towson, Md. 21204

Dear Mr. Hession:

Re: Case No. R-82-80
Truman Grabill

In accordance with Rule B-7 (a) of the Rules of Procedure of the Court of Appeals of Maryland, the County Board of Appeals is required to submit the record of proceedings of the zoning appeal which you have taken to the Circuit Court for Baltimore County in the above matter within thirty days.

The cost of the transcript of the record must be paid by you. Certified copies of any other documents necessary for the completion of the record must also be at your expense.

The cost of the transcript, plus any other documents, must be paid in time to transmit the same to the Circuit Court not later than thirty days from the date of any petition you might file in court, in accordance with Rule B-7 (a).

Enclosed is a copy of the Certificate of Notice; also invoice covering the cost of certified copies of necessary documents.

Very truly yours,

June Holmen
June Holmen, Secretary

Encls.
file

Truman Grabill
Case No. R-82-80

April 29, 1982

Order of County Board of Appeals granting the reclassification from D.R. 5.5 to D.R. 16

May 19, 1982

Order for Appeal filed in Circuit Court for Baltimore County by John W. Hession, III, Esq., People's Counsel for Baltimore County

May 20, 1982

Certificate of Notice sent to all interested parties

May 19, 1982

Petition to accompany Order for Appeal filed in Circuit Court for Baltimore County

May 19, 1982

Petition for Extension of Time to file Transcript of Proceedings

July 1, 1982

Transcript of testimony filed

Petitioner's Exhibit A - Plat showing property

- " " B 1 - Photo taken looking northeast from Grabill property
- " " B 2 - Photo of Industrial Park
- " " C 1 thru 6 - Series of Photos
- " " D 1 - D 3 - Series of Photos showing townhouses
- " " E - Official zoning map, Balto. County
- " " F - Official zoning map, Balto. County
- " " G - Aerial Map, dated 1977
- " " H - Document - Paul Lee Engineering Co.
- " " I - Letter to Mr. DiCicco from Councilman Smith
- " " J - Tape used at Hearing
- " " K - Nov. 6, 1979, Opinion from Bd. of Appeals
- " " L - Judge Buchanan Decision, July 11, 1980
- " " M - Letter from Court of Special Appeals, 11/19/80
- " " N - Mandate from Court of Special Appeals, Nov. 19, 1980

People's Counsel Exhibit 1A thru 1K - Series of Photos

- " " 2 - Recommended 1980 Comprehensive Zoning Map
- " " 3 - Balto. County Council Log, 3rd District, 2 page exhibit

494-3180

County Board of Appeals

Room 219, Court House
Towson, Maryland 21204

May 20, 1982

Robert A. DiCicco, Esq.
405 Central Ave.
Towson, Md. 21204

Dear Mr. DiCicco:

Re: Case No. R-82-80
Truman Grabill

Notice is hereby given, in accordance with the Rules of Procedure of the Court of Appeals of Maryland, that an appeal has been taken to the Circuit Court for Baltimore County from the decision of the County Board of Appeals rendered in the above matter.

Enclosed is a copy of the Certificate of Notice.

Very truly yours,

June Holmen
June Holmen, Secretary

Encl.
cc: Truman Grabill
W. E. Hammond
J. E. Dyer
N. Gerber
J. Hoswell
Board of Education

Truman Grabill
Case No. R-82-80

People's Counsel Exhibit 4 - Cycle Planning Board Review of
Petition

- " " " 5 - Letter dated Oct. 3, 1980, to James Smith from Robert DiCicco
- " " " A - Professional Resume of J. Carroll Hagan
- " " " B 1 thru 5 - Public Works Agreements
- " " " C - Selected Public Works Agreement and Cost

July 6, 1982

Record of proceedings filed in the Circuit Court for Baltimore County

Record of proceedings pursuant to which said Order was entered and said Board acted are permanent records of the Zoning Department of Baltimore County, as are the use district maps, and your respondents respectively suggest that it would be inconvenient and inappropriate to file the same in this proceeding, but your respondents will produce any and all such rules and regulations, together with the zoning use district maps at the hearing on this petition, or whenever directed to do so by this Court.

Respectfully submitted,

June Holmen
June Holmen
County Board of Appeals of Baltimore County

RE: PETITION FOR RECLASSIFICATION
E/S Rolling Rd., 2600' N of
Dogwood Rd., 2nd District

TRUMAN GRABILL, Petitioner

Zoning Case No. R-82-80 (Item 21)

IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY

AT LAW

Misc. Docket No. 14

Folio No. 148

File No. 82-M-143

ORDER FOR APPEAL

MR. CLERK:

Please note an appeal to the Circuit Court for Baltimore County from the Opinion and Order of the County Board of Appeals of Baltimore County, under date of April 29, 1982, granting a zoning reclassification on the subject property from D.R. 5.5 to D.R. 16 zone.

Peter Max Zimmerman
Peter Max Zimmerman
Deputy People's Counsel

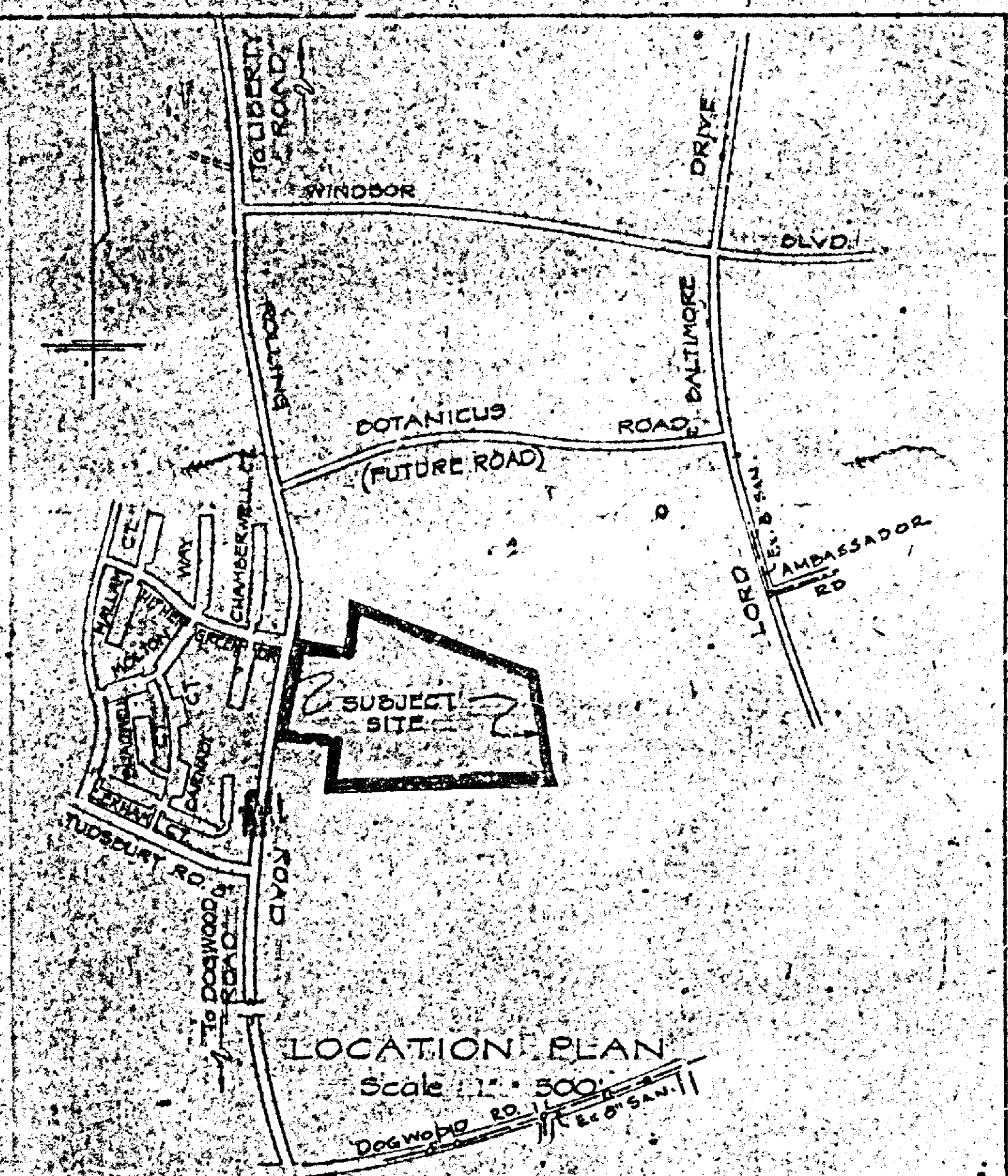
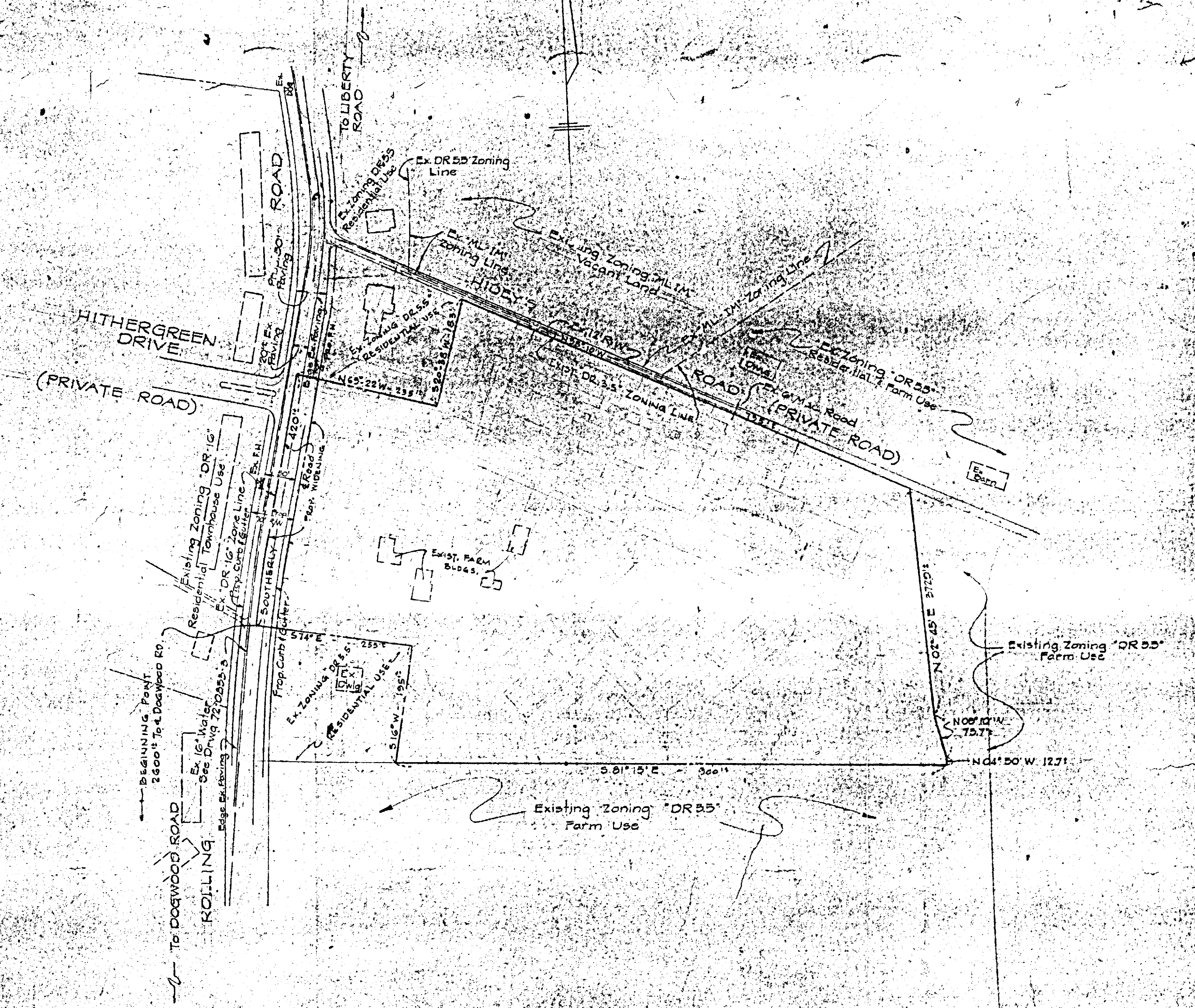
John W. Hession III
John W. Hession, III
People's Counsel for Baltimore County
Rm. 223, Court House
Towson, Maryland 21204
494-2188

I HEREBY CERTIFY that on this 19th day of May, 1982, a copy of the foregoing Order for Appeal was delivered to the Administrative Secretary, County Board of Appeals, Rm. 200, Court House, Towson, Maryland 21204; and a copy was mailed to Robert A. DiCicco, Esquire, 405 Central Avenue, Towson, Maryland 21204.

Peter Max Zimmerman
Peter Max Zimmerman

Received: *Edith T. Eisenhart*
Edith T. Eisenhart
Administrative Secretary,
Board of Appeals of
Baltimore County

RECEIVED
BALTIMORE COUNTY
MAY 15 10 17 AM '82
COUNTY BOARD
OF APPEALS
BY: *[Signature]*



LOCATION PLAN
 Scale: 1" = 500'
 Dogwood Rd. 1/4 Sec. 8, T. 10 N., R. 10 E., S. 10 W.

GENERAL NOTES
 1. Area of Property Equals 13.7 Acres.
 2. Existing Zoning of Property "DR 55"
 3. Existing Use of Property "Residential / Farm Use"
 4. Proposed Zoning of Property "DR 16"

PLAT TO ACCOMPANY PETITION
 FOR
 RECLASSIFICATION OF PROPERTY
 VICINITY
 ROLLING ROAD / HIDEY'S LANE
 Election District 2
 Scale: 1" = 100'
 Baltimore Co., Md.
 February 25, 1981
 APR 3 1981
 REVISED PLANS
 J. Lee
 10/10/81

PAUL LEE ENGINEERING, INC.
 206 Washington Avenue, Towson Md. 21204



RE: PETITION FOR RECLASSIFICATION : IN THE CIRCUIT COURT
E/S Rolling Rd., 2600' N of :
Dogwood Rd., 2nd District : FOR BALTIMORE COUNTY
TRUMAN GRABILL, Petitioner : Misc. Docket No. _____
Zoning Case No. R-82-80 (Item 21) : Folio No. _____
: File No. _____

PETITION ON APPEAL

The People's Counsel for Baltimore County, Protestant below and Appellant herein, in compliance with Maryland Rule 8-2(a), files this Petition on Appeal setting forth the grounds upon which this Appeal is taken, viz:

1. The record failed to support a finding of error in the Comprehensive Zoning Map process. Baltimore County Code Section 2-58.1(J)(1).
2. The record failed to show that the prospective reclassification was warranted. Baltimore County Code Section 2-58.1(J)(2).
3. The decision of the Board of Appeals to reclassify the subject property was arbitrary, capricious, and not based on substantial and legally competent evidence.
4. The County Council, in the course of the 1980 Comprehensive Rezoning process, placed an appropriate zoning reclassification on the subject property, and provided for it a reasonable use.
5. The Board of Appeals, in its finding of error, wrongfully substituted its judgment for that of the County Council.

WHEREFORE, Petitioner prays that the Order of the Board of Appeals dated April 29, 1982 be reversed, and the D.R. 5.5 zoning classification enacted by legislation be reinstated.

AND AS IN DUTY BOUND, etc.,

John W. Hession, III
John W. Hession, III
People's Counsel for Baltimore County

RE: PETITION FOR RECLASSIFICATION : IN THE CIRCUIT COURT
E/S Rolling Rd., 2600' N of :
Dogwood Rd., 2nd District : FOR BALTIMORE COUNTY
TRUMAN GRABILL, Petitioner : AT LAW
Zoning Case No. R-82-80 (Item 21) : Misc. Docket No. _____
: Folio No. _____
: File No. _____

ORDER

Upon the foregoing Petition for Extension of Time to File Transcript of Proceedings, it is hereby ORDERED this _____ day of May, 1982, that the time for filing in Court the transcript of proceedings before the Board of Appeals is hereby extended until _____.

JUDGE

- 2 -

I HEREBY CERTIFY that on this 19th day of May, 1982, a copy of the foregoing Petition on Appeal was delivered to the Administrative Secretary, County Board of Appeals, Rm. 200, Court House, Towson, Maryland 21204; and a copy was mailed to Robert A. DiCicco, Esquire, 405 Central Avenue, Towson, Maryland 21204.

Peter Max Zimmerman
Peter Max Zimmerman

Received: Edith T. Eisenhart - 5/19/82
Edith T. Eisenhart
Administrative Secretary,
Board of Appeals of
Baltimore County

RECEIVED
BALTIMORE COUNTY
MAY 19 10 15 AM '82
COUNTY BOARD
OF APPEALS
BY:

IN THE MATTER :
OF THE APPLICATION : BEFORE
OF TRUMAN GRABILL : COUNTY BOARD OF APPEALS
FOR REZONING OF :
property located on the : OF
E/S of Rolling Road 2600' : BALTIMORE COUNTY
N. of Dogwood Road :
2nd District : No. R-82-80

OPINION

This case comes before the Board on a petition for reclassification of a 13.7 acre tract of land from D.R. 5.5 to D.R. 16, in the Second Election District of Baltimore County. The subject property is located on the east side of Rolling Road and directly abuts Security Industrial Park to the north, and lies wholly within a rather large parcel of land zoned D.R. 5.5.

Presentation of testimony and evidence in this case consumed two full days, December 9, 1981 and January 7, 1982. In addition, detailed Memorandums were submitted for the Board's consideration from Petitioner's counsel and from People's Counsel of Baltimore County. In this Opinion the Board will not attempt to recap all of this testimony but will allow the record to speak for itself. This is not the first time this particular parcel has been an issue before this Board. In November, 1979, this request for reclassification was heard and granted by this Board. This granting was affirmed by the Circuit Court for Baltimore County on July 11, 1980. In the meantime, however, the subject site was identified as a specific issue on the 1980 Comprehensive Map process, (No. 3-2), and on August 4, 1980, the County Council retired the issue and retained the D.R. 5.5 classification. When the Council took this action, the appeal pending in the Court of Special Appeals was dismissed. Therefore, the zoning on this parcel of land was retained at D.R. 5.5 on the 1976 Comprehensive Map process without being a specific issue, was petitioned for and denied D.R. 16 zoning by the Zoning Commissioner, then on appeal to the County Board of Appeals was granted D.R. 16 which was affirmed by the Circuit Court, and then retired as a specific issue on the 1980 Comprehensive Map process as D.R. 5.5 zoning. The Board mentions all of these proceedings to emphasize that this parcel is no stranger to all of the parties involved.

RE: PETITION FOR RECLASSIFICATION : IN THE CIRCUIT COURT
E/S Rolling Rd., 2600' N of :
Dogwood Rd., 2nd District : FOR BALTIMORE COUNTY
TRUMAN GRABILL, Petitioner : AT LAW
Zoning Case No. R-82-80 (Item 21) : Misc. Docket No. _____
: Folio No. _____
: File No. _____

PETITION FOR EXTENSION OF TIME TO FILE TRANSCRIPT OF PROCEEDINGS

The People's Counsel for Baltimore County, Appellant herein, petitions this Court, pursuant to Maryland Rule 87(b), for an extension of time within which to file the transcript of proceedings before the Baltimore County Board of Appeals and in support of this Petition states:

Carol Ann Beresh, Court Reporter for the County Board of Appeals at the time of the hearing before said Board in the above-entitled case, has advised Appellant that because of a backlog of cases, she will need a thirty-day extension of time to prepare the transcript of proceedings.

WHEREFORE, Appellant prays this Honorable Court to extend the time for filing the transcript until Monday, July 19, 1982.

John W. Hession, III
John W. Hession, III
People's Counsel for Baltimore County
Peter Max Zimmerman
Peter Max Zimmerman
Deputy People's Counsel
Rm. 223, Court House
Towson, Maryland 21204
494-2188

- 2 -

I HEREBY CERTIFY that on this 19th day of May, 1982, a copy of the foregoing Petition for Extension of Time to File Transcript of Proceedings was served on the Administrative Secretary, County Board of Appeals, Rm. 200, Court House, Towson, Maryland 21204; and a copy was mailed to Robert A. DiCicco, Esquire, 405 Central Avenue, Towson, Maryland 21204.

Peter Max Zimmerman
Peter Max Zimmerman

Received: Edith T. Eisenhart - 5/19/82
Edith T. Eisenhart
Administrative Secretary,
Board of Appeals of
Baltimore County

Acknowledged and Approved: Carol Ann Beresh
Carol Ann Beresh
Official Reporter

RECEIVED
BALTIMORE COUNTY
MAY 19 10 15 AM '82
COUNTY BOARD
OF APPEALS
BY:

TRUMAN GRABILL - R-82-80

2.

The Board is well aware of the presumption of the correctness of original zoning and of comprehensive zoning, and that strong evidence of error is required to make the issue of mistake in comprehensive zoning debatable. This property has twice by the Council been zoned D.R. 5.5. The Board in this case, as in many others, is required to project itself into the reasoning of the County Council and either affirm or amend its decisions without knowledge of what information was available to the Council when its decision was made. Surely all the testimony and evidence produced for this Board's consideration in two full days of hearing could in no way have been available to the Council who had to consider literally hundreds and hundreds of parcels of land.

The following facts were produced for this Board's consideration by direct testimony and presented exhibits:

1. That the property abuts the large industrial park known as Security Industrial Park containing some 280 acres zoned ML-IM on its northern boundary.
2. Directly to the east and across Rolling Road there are two complexes of townhouses and apartments totalling some 700 units on land zoned D.R. 16.
3. Development of the large parcel of D.R. 5.5 zoning is either underway or proposed. One subdivision called "Horne Woods" and containing twelve single family homes has been developed. A tentative subdivision plan for 226.4 units on 41.2 acres to be known as "Wallingford" has been approved on D.R. 5.5 zoning, both parcels being south of the subject site.
4. Mrs. Virginia Appleby, abutting neighbor to the south of the subject site, has just completed sale of her property zoned D.R. 5.5. The Board takes note of the fact that this parcel abuts the subject site but does not abut the industrial park.
5. Mr. Grabill, property owner, testified that this parcel has long been on the market but not one single offer has been forthcoming for this D.R. 5.5 parcel abutting the industrial park.

There was testimony presented which indicated that to grant D.R. 16 to this parcel alone could have a domino effect in this area and that this type zoning is better accomplished comprehensively. The Board could not agree more. The Board seriously questions what the Council's reaction would have been had the zoning line on the

TRUMAN GRABILL - R-82-80

3.

south of the subject site been extended to meet the ML-IM zoning line, thus creating a reasonable buffer or transition use area between the large industrial park and the development of single family homes to the south.

Before this Board can grant the requested rezoning the Board must adjudge error in the Council's action. There is clearly no issue of confiscation as the property could be developed within its present zoning. It appears, however, that to sell individual lots abutting a huge industrial park would be highly unlikely. No matter how attractive an industrial park may be planned, there is allowed by right many uses not conducive to direct abutment with single family homes. Testimony produced indicated high costs for cluster type development at D.R. 5.5 zoning, making this option somewhat remote. Testimony indicated traffic in this area to be heavy but not excessive, and that the development of this parcel as D.R. 16 would have some impact but would not be overwhelming. As a matter of fact, development in this area, now underway and proposed, could well hasten proposed road improvements in the area.

It should be noted herein that Petitioner's Memorandum quotes several legal decisions that support his petition for the zoning reclassification, and People's Counsel's Memorandum quotes several decisions that support his claim for denial of the request. As a last resort the Board will refer to the motto displayed in our courtroom, "Reason is the Life of the Law," and in the subject case "Reason" dictates that some transitional use should be provided between land being used as an industrial park and land zoned for what is normally considered single family residential use on single lots.

For all of these reasons, the Board is of the Opinion that the D.R. 5.5 zoning on the subject parcel is in fact in error and will so order its reclassification to the requested D.R. 16 zoning.

ORDER

For the reasons set forth in the foregoing Opinion, it is this 29th day of April, 1982, by the County Board of Appeals, ORDERED that the reclassification

from D.R. 5.5 to D.R. 16 petitioned for, be and the same is hereby GRANTED.

Any appeal from this decision must be in accordance with Rules B-1 thru

B-12 of the Maryland Rules of Procedure.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

William T. Hackett
William T. Hackett, Chairman

LeRoy B. Spurrer
LeRoy B. Spurrer

Patricia Phipps
Patricia Phipps

PROJECT	PUBLIC SERVICE DEVELOPMENT COSTS	SALES PRICE (approx)
A	\$8,700.00 per unit	\$80,000.00
B	\$6,589.00 per unit	\$65,000.00
C	\$7,998.00 per unit	\$65,000.00
D	\$7,224.00 per unit	\$70,000.00

Applying Hagan's figures to the subject site, at the least, the Petitioner could anticipate that even with an \$8,000.00 per unit development cost, his unit salesprice would have to be \$65,000.00 or \$25,000.00 more than the market price as established by the townhouses across the street from the site.

The Petitioner's real estate expert witness, Frederick P. Klaus, testified that the County Council committed error when it failed to consider that the site could not be used for residential development at D.R. 5.5 because of the factors outlined by Mr. Lee.

He also assigned error to the Council's action because it failed to consider the fact that the Board of Appeals had re-classified the property D.R. 16 after extensive hearing and that the Board's decision had been affirmed by the Circuit Court.

In support of this conclusion, the Petitioner introduced an October 7, 1980 letter from the Second District Councilman, Petitioner's Exhibit I, sent to Petitioner's attorney in response to Petitioner's October 3, 1980 complaint (See People's Counsel's Exhibit 5 introduced at December 9, hearing) that the Council had retired the issue without giving consideration to the affirmance of the Board of Appeals decision by Judge Buchanan.

It is clear from the Councilman's response that he only considered the Planning Staff and Planning Board recommendations and was not aware of Circuit Court's action. It should be noted that People's counsel witness, James Hoswell of the Planning Staff, confirmed that the only official written information about the Board of Appeals action was in the Council Log (People's Counsel's

IN THE MATTER OF THE
PETITION FOR RE-CLASSIFICATION
OF
TRUMAN GRABILL
E/s Rolling Road
2,600' N of Dogwood Road
* * * * *

BEFORE THE
COUNTY BOARD OF APPEALS
* * * * *
Case No. R-82-80
* * * * *

PETITIONER'S MEMORANDUM

Statement of Case

This is Petitioner's Memorandum of law in support of his request for change of zoning to D.R. 16 of a 13.7 acre tract of land in the Second Election District of Baltimore County, zoned D.R. 5.5, but sandwiched between a fully developed 280-acre Industrial Park and a 700-unit D.R. 16 apartment complex.

Question Presented

Whether the Baltimore County Council committed error when it adopted the 1980 Comprehensive Zoning Map and classified the subject property D.R. 5.5.

Statement of Facts

The Petitioner is no stranger to this Board. On November 6, 1979 this Board acted on the identical request of Petitioner and changed the zoning of the subject property from D.R. 5.5 to D.R. 16. Although the Board's decision was upheld by the Circuit Court for Baltimore County and also not reversed by the Court of Special Appeals, nevertheless, the County Council, in adopting the 1980 Comprehensive Zoning Maps, failed to properly consider the board's action, and the subsequent court affirmance but classified the property D.R. 5.5.

In the first day of hearings before the board, December 9, 1981, the Petitioner exhibited a brief video tape of the site and

Exhibit 3, December 9, 1981 hearing) which contained no reference that the case had been affirmed by Judge Buchanan. On cross-examination, Mr. Hoswell admitted that although he accompanied the councilman on the bus tour of July 15, 1980, he did not advise the councilman that the Circuit Court had affirmed the Board of Appeals decision.

The Petitioner, Truman Grabill, a farmer, testified that his family had owned the property for over 30 years and had used the land for farming. He said that farming was no longer possible on the site because of the lack of available farm labor; the increased distance from farm markets which have moved; the small size of the acreage; and the loss of other farmland in the vicinity caused by development and urban sprawl. Furthermore, the site was no longer suitable as a single family residence because the high density residential development and the industrial park.

Appearing in favor of the Petitioner was Mrs. Virginia Appleby, the owner of a tract of land several hundred feet south of the subject tract.

There were no protestants to the granting of this application.

The only party to present testimony was the People's Counsel. Its first witness was Mr. Hagan, whose testimony has been discussed above, was supportive of the Petitioner. Also called was Robert Morton from the Public Works Department who introduced figures relating to county development costs. His testimony can be characterized as an elaboration of the testimony of Paul Lee and J. Carroll Hagan.

Richard Flanagan, traffic expert testified regarding the amount of trips expected to be generated if the site was zoned D.R. 16.

There was no testimony from this witness that such an increase would cause a hazard or otherwise unduly impact on the traffic conditions in the neighborhood. In fact he testified, in response to People's Counsel inquiry that the impact on the Beltway traffic at Security of the trips generated by the proposed zoning change at

its environment, Exhibit J. The site was also detailed for the Board in map Exhibits E, F, and G; color photograph Exhibits B and C collectively; and in Exhibit A, Plat prepared for the zoning application by expert witness, Paul Lee.

In brief, the site was described as bounded on the north and east by the 280-acre Security Industrial Park with such industries or employers as the Baltimore Gas and Electric Co., the F.B.I., Barre International Corporation, C & P Telephone Co., Eastman Kodak, MCEEA, and a host of office tenants at The Rutherford Plaza Office Center. Several thousand yards to the south is the Security Square Mall, a major regional shopping center with four major national retailers and a host of specialty stores. Also, there are two national motel chains, another 55-acre industrial office park with numerous tenants and an extensive apartment complex, Quail Meadows.

On the west, directly opposite the site, are two townhouse apartment complexes, Heraldry Square and Kingswood Common, totaling approximately 700 units. Some of the units are individually owned townhouses selling at approximately \$39,000.00 - \$41,000.00.

Mr. Lee testified that the property was serviced by, or had available to it adequate roads, public transportation, schools and other public services. In his opinion D.R. 5.5 was an improper zone for the site because present zoning regulations, topography and development costs rendered the land impossible for residential development for anything less than D.R. 16 density. He added that even though B.C.2R regulations 1 B01.1 A-C permitted other uses such as farming, churches, hospitals, schools, grave yards, etc., none of those uses were possible on the site.

In support of his opinion he prepared a development cost estimate for public improvements for the theoretical maximum number of units allowed under the D.R. 5.5 zone. His estimate, Exhibit H, revealed that the average cost per unit for the public improvements only, excluding land costs, building and sales costs, was approxi-

the site would be inconsequential.

James Hoswell testified regarding the wisdom of the D.R. 5.5 classification. He told the Board good planning theory favored high density residential zones as a buffer between low density D.R. 5.5 residential zones, and commercial or industrial zones such as Security Industrial Park. However he stated that "we live in an imperfect world" and that textbook models could not always be achieved. The main reason he ascribed as to why the zoning should remain unchanged was because a re-classification might precipitate increases in intensity of development in the area.

Mr. Hoswell failed to point out, however, that increased development would be harmful or detrimental to the neighborhood.

In short, there was no testimony that re-classification of the site from D.R. 5.5 to D.R. 16 would be detrimental to the health, safety, or welfare of the neighborhood.

Argument

I

THE COUNTY COUNCIL COMMITTED ERROR WHEN IT ZONED THE SUBJECT PROPERTY D.R. 5.5 INSTEAD OF D.R. 16.

In the landmark case of Wakefield vs. Kraft, 202 Md. 136 (1953), the Court of Appeals announced the legal test to be applied in re-zoning cases that

"... in order to justify a change in zoning, it must appear, therefore, that either there was a mistake in the original zoning or that the character of the neighborhood was changed to an extent which justified the amendatory action."

In Johar Corporation vs. Rodgers Forge Community Association, 236 Md. 106, 202 A.2d 612 (1964), the Court of Appeals upheld the Board's decision to rezone six acres on Stevenson Lane 1,000 feet west of York Road which was bounded on north by 400-acre tract of extensive hospital development (Sheppard Pratt & Greater

mately \$9,100.00 per unit. He added, that in all probability, his estimate would be lower than actual cost because, (a) based upon his previous experience as the Developmental Engineer for Security Industrial Park, excavation at that site was plagued with underground rock, therefore, in all probability the Grabill site would face the same plight, and be subject to increased excavation costs; (b) the developer would have to pay for the extension of acquisition of rights-of-way for sewer and storm drains to the site, approximately 2,100 feet, thereby adding additional cost.

It was his expert opinion it was not possible to acquire the land, build and sell a townhouse on the site for \$40,000.00 if the development costs, alone, were \$9,100.00 per unit. However, if the density was increased to D.R. 16, the per unit development cost would be substantially reduced, because development would be spread over more lots. This would reduce the projected sales price of any townhouse development, and bring it in line with the market.

Support for Mr. Lee's testimony came from the People's Counsel expert witness, J. Carroll Hagan, an engineer involved in land development. Mr. Hagan said that he was asked to review Mr. Lee's public costs development estimate, Exhibit H, and found that it was a reasonable estimate. He testified that based upon four of his current projects in Baltimore County, public services development costs for townhouse projects averaged \$8,000.00 per unit. In his opinion Paul Lee's \$9,100.00 per unit figure was not unreasonable.

The People's Counsel witness also gave support to Petitioner's claim that the high land development cost prevented development of the land for townhouses in the market range of \$40,000.00. According to Hagan, his example townhouse developments had development costs and sales prices as follows:

Baltimore Medical Center); on west by extensive row-home development of Rodgers Forge; on east by sharp slope to stream beyond which was older residential subdivision of Yorktown; on south by Stevenson Lane and more Rodgers Forge; from R. 6 (individual houses) to R.A. Apartment zone because of change in the neighborhood and mistake in the original zoning. In support of reclassification, the Court approved the proponents' expert land planner's testimony: that the council erred in failing to consider need for additional apartments in the area; in failing to consider impact of development of Sheppard-Pratt Hospital complex; that in view of the topography, reasonable economic use of the property was denied by R. 6 zone, which testimony support a finding of error.

In Board vs. Oak Hill Farms, Inc., 232 Md. 274, 192 A.2d 761 (1965), involving request to rezone 21-acre zoned medium density to high density apartment zone, the site was bounded on north and east by general commercially developed, the south by medium density residential, and the west by land zoned high density; the Court reversed a denial of rezoning because evidence showed there was error: in failing to consider the need for apartments generated by the adjacent land used for commercial; in failing to consider that topography of land made it impractical if not impossible of developing the land at the current zone. The Court also pointed out that the Protestants' "rationalizations" failed to rebut factual testimony presented by Petitioner.

In Overton vs. Board, 225 Md. 212, 170 A.2d 172 (1961) where subject site of 40 acres was bounded by property zoned detached residential on east; commercial on south; rural residential on north and west, and the zoning request was to low density from rural residential, the Court found that there had been error in the original zoning because evidence showed that topography and drainage made land unsuitable for use as detached dwellings but that low density residential was the best feasible use.

In Dill vs. Johar Corporation, 242 Md. 16, 217 A.2d 364, the

Court affirmed a reclassification of a five-acre tract from residential to business based upon error, where evidence showed: that the land on the north, south, and east of property was zoned commercial; that an expert land planner established that council erred in not recognizing incompatibility of the current zone with surrounding land use; that the land was unsuitable for residential or office use.

Likewise, in the case at bar, the subject property is flanked by intensive and substantial high density residential development directly across the street and a major 280-acre industrial office complex behind it. A recognized expert engineer and realtor have established that there was error in the original zoning because:

A. The Council failed to consider the impact of The Security Square Mall, one of Baltimore County's largest regional shopping centers, the new industrial and business major development at Rolling Road and Security Boulevard and The Security Industrial Park as creating a need for more apartment land.

B. The Council failed to consider that the developing road pattern through the industrial park would relieve Rolling Road traffic and that the subject site offered a connecting route for same.

C. The Council did not consider that this site, because of high development costs, could not be used for current zone.

D. The County Council was unaware that the Circuit Court for Baltimore County had reviewed the proceedings of the fully developed Board of Appeals hearing in this matter and affirmed the Board.

E. Because the County Council retired the matter as an issue prematurely, it was not aware that at the time its map legislation took effect the Petitioner had a final unappealable grant of D.R. 16 zoning.

In contrast to the factual evidence of the Petitioner is the testimony of Planning Department witness that although a grant of

[8]

RE: PETITION FOR RECLASSIFICATION : BEFORE THE COUNTY BOARD OF APPEALS
from D.R. 5.5 to D.R. 16 Zone
E/S Rolling Rd., 2600' N of Dogwood : OF BALTIMORE COUNTY
Rd., 2nd District

TRUMAN GRABILL, Petitioner : Case No. R-82-80 (Item 21, Cycle I, 1981)
: : : : : :

MEMORANDUM OF PEOPLE'S COUNSEL

I. BACKGROUND

The Planning Board and County Council considered the subject property as a specific issue (No. 3-2) during the 1980 Comprehensive Zoning Map process. The recommended 1980 Comprehensive Zoning Map, adopted March 20, 1980 by the Planning Board, identified the Petitioner's request for D.R. 16 zoning, and the Planning Staff and Planning Board recommendation of D.R. 5.5. The County Council, upon review of the matter, and a site visit on July 15, 1980, agreed with the Board recommendation and retired the issue on August 4, 1980.

The property was the subject of a previous petition requesting D.R. 16 zoning in 1978, challenging the 1976 Comprehensive Map. Contrary to Petitioner's contention, however, the request was not identical. In 1976, the property had not been identified as a specific issue before the County Council. Moreover, the D.R. 5.5 classification at that time was subject to residential transition area restrictions, not applicable to D.R. 16, which were modified by Bill No. 124-81, amending Section 1801.1B, of the Baltimore County Zoning Regulations to include similar coverage of D.R. 16. An additional difference is the establishment of the Hanna Woods Subdivision on nearby land zoned D.R. 5.5, as well as the progress of the nearby "Wallingford" development to public works agreement.

The prior request for reclassification was denied by the Zoning Commissioner on September 21, 1978, granted by the County Board of Appeals on November 6, 1979, and affirmed by the Circuit Court for Baltimore County on July 11, 1979, following which an appeal was noted to the Court of Special Appeals by the People's Counsel. Contrary to Petitioner's implication, the Court of Special Appeals took no substantive action on the

D.R. 16 zoning might be proper planning, he was not in favor because it might open the door to increased land use. But no witness testified that such a result would be bad for the community.

Applying the test set forth in Wakefield and against the factually congruity of the Oak Hill, Overton, Rodgers Forge, and Dill cases it is clear that the Petitioner has presented sufficient evidence to overcome the presumption of validity in the original zoning and has established that the Council committed error in failing to zone this site D.R. 16.

II

THE ZONING OF THIS SITE D.R. 5.5 IS CONFISCATORY

The legal principles applicable to the taking of private property without payment of just compensation by zoning action have been set out by the Court of Appeals in Mayor vs. Borinsky, 239 Md. 611, 622; 212 A.2d 508, 514 (1965):

"The legal principles whose application determines whether or not the restrictions imposed by the zoning action on the property involved are an unconstitutional taking are well established. If the owner affirmatively demonstrates that the legislative or administrative determination deprives him of all beneficial use of the property, the action will be held unconstitutional. But the restrictions imposed must be such that the property cannot be used for any reasonable purpose. It is not enough for the property owners to show that the zoning action results in substantial loss or hardship."

In Baltimore vs. Cohn, 204 Md. 523, 162 A.2d 447 where property had been zoned residential but evidence established that the tract was adaptable only for commercial or industrial purposes, zoning was arbitrary and unreasonable and deprived owner of property without due process of law. Cf. Dill vs. Jobar Co., supra.

In this case Mr. Paul Lee, an acknowledged engineering and zoning expert gave unrebutted testimony (which was supported by the People's Counsel expert) that because of the current zoning

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matter. Rather, when the adoption of the 1980 Comprehensive Map rendered the case moot, the People's Counsel terminated the appeal because no longer necessary.

During the 1980 Comprehensive Map process, the County Council was aware of the prior grant of D.R. 16 zoning by the County Board of Appeals, as reflected by the Planning Board recommended map log of issues. That log also indicated the pendency of the matter in Circuit Court. Contrary also to the Petitioner's contention, the County Council was presumably aware also, by the time it retired the issue, that the Circuit Court had affirmed the reclassification. There is no specific evidence to the contrary.

In other words, in contrast with the 1976 Map process, the County Council focused on the subject property as a specific issue, was familiar with the prior litigation, and made a well-considered decision to designate the zoning as D.R. 5.5. The prior litigation in any event itself was inconclusive because rendered moot before any decision by the Court of Special Appeals. The restrictions on land use in the D.R. 5.5 classification were further modified by Bill No. 124-81. Accordingly, the Board of Appeals now faces a petition quite different from the one it granted in 1979. This underlines the need of the Board of Appeals to take a fresh look at the case, which in any event is required because the 1980 Map process stands on its own and supersedes any consideration of prior litigation.

II. DESCRIPTION OF THE PROPERTY AND NEIGHBORHOOD

The subject 13.7 acre tract, with a dwelling and farm buildings, lies in a quadrant of approximately 100 acres all zoned D.R. 5.5, in the area east of Rolling Road and north of Dogwood Road in Western Baltimore County. The tract itself is in the northwestern portion of this quadrant, fronting on Rolling Road.

The area zoned D.R. 5.5 to the south is largely vacant, with the exception of an existing elementary school and Our Lady of Perpetual Help Church on the north side of Dogwood Road, and a new subdivision of 12 single family homes, called Hanna Woods. County records also indicate an approved tentative subdivision plan and public works agreement for the "Wallingford" development comprising 226.6 units, on 41.2 acres

regulations and development rules the site could only produce as a theoretical maximum 75 units or lots and that the cost of land development for them was \$9,100.00 per lot; and when the cost of building alone was added, it was clear that such a development would be a loss situation. More importantly, however, he allowed as how the development costs would probably be higher because of rocky terrain and additional costs for sewer easements. Based on the current market for townhouses in the area, approximately \$40,000.00, the conclusion was inescapable that the property could not reasonably be developed at D.R. 5.5.

Not only was there unrebutted evidence that the property could not be developed for residential use under D.R. 5.5 but there was unrebutted testimony from experts that ancillary uses such as farming, funeral homes, etc. whether permitted by right or specific exception could not reasonably be made at this site. Cf., Coppolino vs. Board, 23 Md. App. 358, 328 A.2d 55 (1974).

In light of this overwhelming testimony establishing the confiscatory nature of the zoning, based upon strong factual basis and evidence, to which not even a scintilla of testimony was offered in rebuttal, it is clear that the Petitioner established that the property cannot be used for any reasonable purpose and therefore the zoning of D.R. 5.5 must be regarded as confiscatory.

Respectfully submitted,

ROBERT A. DICICCO
405 Central Avenue
Towson, MD 21204
825-2000

[10]

- 3 -

located at the northeast corner of Rolling and Dogwood Roads.

There are several homes immediately to the north of the site, and the neighborhood generally to the north indicates a mix of townhouse, apartment, and single family development on land zoned residential. To the east of the quadrant, and hooking irregularly around to the north lies a portion of the Security Industrial and Office Development located on land zoned ML-IM. West of the quadrant, separated by Rolling Road, is a substantial area zoned D.R. 16 including the Kingswood Common Apartments.

The Petitioner's description of the neighborhood is misleading because it omits completely the substantial areas zoned D.R. 5.5, the existing homes and residential subdivisions, and the plans in progress for development on land zoned D.R. 5.5. The Petitioner also misleads the Board by implying that the Security Square Mall, two national motel chains, a 55 acre industrial office park, and an extensive apartment complex, "Quail Meadows", are close to the subject property. The true distances of these sites to the south are:

Security Square Mall - more than one mile;
Holiday Inn and Ramada Inn - 1.3 miles;
Rolling Industrial Park - more than 9/10 of a mile; and
Quail Meadows - more than 3/4 of a mile.

Otherwise stated, the immediate neighborhood contains primarily a mix of residentially zoned land both developed and vacant, as well as the Security Industrial Park. The County Council was well aware of the area and chose to retain the quadrant in which the subject site is located as D.R. 5.5.

III. PUBLIC SERVICES, TOPOGRAPHY, GEOLOGY

Michael Flanigan, Assistant Traffic Engineer, reported in his Zoning Advisory Committee comment that:

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of February, 1982, a copy of the foregoing Petitioner's Memorandum was mailed to: People's Counsel, 403 Washington Avenue, Towson, MD 21204.

ROBERT A. DICICCO
405 Central Avenue
Towson, MD 21204

825-2000

Attorney for the Petitioner

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OF APPEALS
BY: [Signature]

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- 4 -

"The existing road system and the proposed improvements cannot be expected to adequately accommodate the development taking place with existing zoning in the area. A higher class of zoning can only add to the problem."

While Flanigan acknowledged that there are presently no failing intersections in the immediate neighborhood and that the subject rezoning might not be considered major, it is apparent that it would place an additional burden on the system.

Petitioner relies on the potential construction of Lord Baltimore Drive to relieve the situation, particularly on Rolling Road, but there is no evidence that this road will be completed prior to the 1984 Zoning Maps. Moreover, there is no evidence to show that the County Council was unfamiliar with the traffic situation.

As to public sewer, the evidence showed the nearest public sewer to lie under Dogwood Road, at a distance of approximately 2100' from the site. It would be anticipated that the developer would connect into the public sewer whether under D.R. 5.5 or D.R. 16 zoning. The cost of connection would depend on the sequence of development, given the evidence of plans in progress on the "Wallingford" development. Development there would bring the sewer line in close proximity to the subject site.

The Petitioner generally conceded that adequate public facilities exist to service the site, whether developed as D.R. 5.5 or D.R. 16. Petitioner suggests that, according to the testimony of Paul Lee, the present zoning regulations and topography would render the land impossible to develop at D.R. 5.5, but there is no evidence to support this. The Petitioner also speculated as to the presence of rock on the site but there is no evidence in Lee's testimony specifically to support this or to indicate that any development in the area was prevented or unreasonably obstructed by subsurface conditions.

Once again, there was no evidence that the County Council was unfamiliar with the condition of the site and, given the prior reclassification petition, was presumably aware of all of Petitioner's contentions.

IV. DEVELOPMENT COSTS

A considerable amount of testimony focused on development costs and their effect on the potential for development. For the Petitioner, Paul Lee estimated the cost for public improvements at approximately \$9100 per unit. This assumed the need to provide the full 2100' sewer connection, including acquisition of rights-of-way for sewer and storm drains (Petitioner in his memorandum doublecounts the rights-of-way costs which are clearly included in Lee's estimate). Lee also testified that if the sewer extension costs were excluded, the average public utility cost of each unit would be approximately \$7300. Contrary to Petitioner's contention, Lee did not testify that it was impossible to develop under D.R. 5.5 zoning with a sale price of \$40,000 per unit. Nor did he state that D.R. 16 zoning would be necessary to accommodate the costs. His testimony was limited to a compilation of estimated costs.

Petitioner relied on the real estate expertise of Frederick Klaus, who, based on his experience, simply stated that the development costs at D.R. 5.5, whether \$9100 or \$7300 per unit were so high as to prevent feasible marketing. He opined that normal per unit development cost was approximately \$3500. On close examination, he refused to testify to any profit margin assumed or to any specific detailed cost budget or revenue analysis.

J. Carroll Hagen, an experienced engineer and consultant in land development, for the People's Counsel, testified that public services development costs per unit for residential development in Baltimore County averaged \$8000. He reviewed Paul Lee's item-by-item estimates and found they were generally reasonable. He noted, of course, that residential development normally awaits the availability of public utilities at the site boundary. It therefore appeared, based on Hagen's testimony, that the estimated development costs for Petitioner, whether \$9100 or \$7300 per unit, were in line with development around the County.

Hagen's testimony was further corroborated by Robert Morton, who described the present lot costs of residential development in Western Baltimore County by referring to recent public works agreements for subdivisions identified on People's Counsel's Exhibit "C".

IX. ARGUMENT

Turning to the important applicable zoning principles, "...perhaps none is more rudimentary than the strong presumption of the correctness of original zoning and of comprehensive rezoning." Otherwise stated, "...strong evidence of error is required to make the issue of mistake in comprehensive zoning fairly debatable and unless such strong evidence is presented by the applicant, the action of the Board in granting a reclassification is arbitrary and capricious." Boyce v. Senby, 25 Md. App. 43, 334 A.2d 137 (1975).

Moreover, as the issue of confiscation is often interrelated with mistake, it need be stated that,

"Applicant must show that he has been deprived of all reasonable use of his property and that it cannot be used for any of the permitted uses in the existing zone." Stratkis v. Beauchamp, 268 Md. 643, 304 A.2d 244 (1973).

In the present case, the applicant quite simply failed to meet the burden to present evidence that the Comprehensive Map ignored specific facts material to the zoning, failed to take undisputed facts into consideration, or caused a deprivation of all reasonable use of the property.

The recent decision in Howard County v. Dorsey (Court of Appeals, No. 73, September Term, 1980) is in point. There, the Petitioner contended the property unsuitable for residential development because "practically surrounded by industrial zoning classifications." He further contended that no reasonable use could be made because the approximately 15 acres of land zoned R-12 were "in a sea of hundreds and hundreds of acres of industrially zoned land." The Court of Appeals rejected both contentions. It found the allegation of unsuitability based on "industrial surroundings" not sufficiently strong in substantial evidence to overcome the presumption of validity of comprehensive zoning. It further noted no evidence to show the Council was unaware of the readily visible physical characteristics and location of the subject property or failure to take them into account. The Court further rejected the confiscation argument, noting the existence of a single family residence

These subdivisions, ranging from 11 to 111 lots, had costs of \$6854 to \$11,324. In particular, "Wallingford" had per lot costs of \$11,324 and "Woods of Wynands," \$9210.

Petitioner's contention that Hagen or Morton supported the Petitioner is, therefore, simply wrong. Petitioner's further representation that Hagen linked the public costs to sales prices in the range of \$65,000 to \$80,000 is also wrong and misleading. Hagen did not make any linkage between costs and prices for development, but rather made the simple point that public costs for residential development - regardless of location, size of tract, or zoning - averaged approximately \$8000 per unit. Accordingly, Petitioner's chart at the top of Page 4 is made out of whole cloth.

V. OTHER USES

Petitioner refers to testimony of Paul Lee that other permitted uses in the D.R. 5.5 zone such as farming, churches, hospitals, etc., are not possible. Even assuming Mr. Lee's vague testimony could be given any weight, it is irrelevant. The same other uses are permitted in the D.R. 5.5 as in the D.R. 16 classification.

VI. TESTIMONY OF GRABILL AND APPLEBY

Petitioner Truman Grabill himself, while reciting his reasons for wanting reclassification, admitted that in his opinion the property under the current D.R. 5.5 classification is worth \$540,000. This overshadows any implication that Petitioner is suffering some sort of oppression. It is significant that his neighbor to the south, Virginia Appleby, appearing in favor of the petition, had just sold her property, also zoned D.R. 5.5.

VII. TESTIMONY OF HOSWELL

County Planner James Hoswell reviewed the site and neighborhood, the 1980 Comprehensive Map history, and the mix of uses in the neighborhood. He testified unequivocally that the designation of D.R. 5.5 for the subject site as well as the quadrant in which it is located, was appropriate. He also underlined the valid consideration that D.R. 16 zoning could reasonably be thought to overcrowd an area already subject to intense development.

presently on the property and the existence of single family development on property adjacent to the north.

In the present case, Petitioner's factual premise that his land is surrounded by industry or commerce is incorrect. Even if it were factually accurate, however, it would not be sufficient to support rezoning under Dorsey. Petitioner's contention regarding confiscation is strikingly similar to that rejected in Dorsey, considering the existence of a single family dwelling and farm houses, and the substantial residential development on nearby property. Petitioner's further attempt to establish confiscation by reference to analysis of development costs should similarly be rejected. It was based on the premise that \$3500 per unit public costs for residential development is normal and reasonable, and that public costs in the area of \$7300 to \$9100 are disproportionate. The hard facts showed, however, that such costs are typical for current residential development in Baltimore County. Petitioner absolutely failed, by hard analysis, to show either the absence of the suitability of existing residential use, or the unfeasibility of new development.

Petitioner's other primary thrust was to urge the theory that the requested D.R. 16 zoning would provide an appropriate buffer against the Security Industrial Park. The so-called "buffer" theory has been tried and rejected in many cases. See, for example, Dahl v. County Board of Appeals, 258 Md. 157, 265 A.2d 227 (1970), in which the Court stated,

"Hindsight might dictate that Ridewood-Lutherville Drive may have been a better choice for the boundary between M-L zone and the residential zone; however, this desirability falls far short of substantiating its adoption as error." 258 Md., at 164, 265 A.2d, at 231.

Analogously, in a case involving the division between residential and commercial zoning, the Court said,

"Zoning inevitably involves the drawing of lines, ...and the Council was not bound to extend a commercial classification beyond the lot where it elected to stop." Montgomery County v. Pleasant, 266 Md. 462, 467, 295 A.2d 216, 219 (1972).

Hoswell also rebutted Petitioner's contention that the County Council, as a matter of policy, adheres to prior Board of Appeals reclassification decisions. He showed, by review of Planning Board and County Council logs, that the County Council was well aware of a number of Board decisions, and that the Council exercised its own independent judgment in each case.

Referring to the Council's consideration of the site, and Hoswell's review of the detailed logs indicating prior Board of Appeals action and pending Circuit Court activity, Petitioner incorrectly suggests that Hoswell accompanied the Council on a bus tour and failed to advise that the Circuit Court had affirmed the Board of Appeals. The fact of the matter is that Hoswell did not go on the bus tour, and there is no specific evidence to negate the presumption of Councilmanic knowledge.*

In sum, Petitioner failed to contradict Hoswell's testimony that the legislative decision to place D.R. 5.5 zoning on the tract was an appropriate one. Moreover, contrary to Petitioner's suggestion, Hoswell specifically stated that development of the property at the density permitted by D.R. 16 would overcrowd the neighborhood. This problem is particularly serious because rezoning in the present case could trigger a domino effect on the zoning of neighboring vacant property.

VIII. APPLICABLE STATUTE

The County Council has provided, in Section 2-58.1(i) of the Baltimore County Code (Bill 46-79) the following criteria prerequisite to a zoning reclassification:

"(i) Before any property is reclassified pursuant to this section, the board of appeals must find:

(1) That there has occurred a substantial change in the character of the neighborhood in which the property is located since the property was last classified, or that the last classification of the property was established in error; and

*Similarly, there is no basis for Petitioner's suggestion, based on the October 7, 1980 letter of James Smith, Councilman for the Third District, that the Council had retired the issue without consideration of Judge Buchanan's decision.

Most recently, in a case arising before the County Board of Appeals, which granted the reclassification, the Court of Special Appeals reviewed and rejected the buffer theory in People's Counsel for Baltimore v. Frey, (No. 1352, September Term, 1980), copy attached.

Petitioner's other arguments, listed as A-E on Page 8, are factually and legally inadequate. Security Square Mall is outside the pertinent neighborhood, irrelevant to the precise zoning issue, and in any event, not unfamiliar to the County Council. The status of Lord Baltimore Drive, with an uncertain completion date, is similarly irrelevant and, in any event, within the Council's knowledge. The high development cost argument has been shown empty. The matter of Circuit Court proceedings on the prior reclassification is immaterial to the new reclassification and, again, was known by the Council. As to the alleged unappealable grant of D.R. 16 zoning at the time of Council retirement of the current issue, this is simply not true. The People's Counsel did in fact appeal.

As in so many cases, the Petitioner implies that the Council acted on misinformation without specific evidence. The Petitioner ignores that the County Council is presumed to have awareness of all relevant facts. The burden of proof is on the Petitioner, not on the County. Petitioner's contentions are particularly objectionable in this case because the allegations themselves are factually incorrect.

As to the confiscation argument, again, the Petitioner's argument, as a practical matter, admits to no more than the increased profitability resulting from a grant of the rezoning. As Judge Smith stated, however, in Cabin John Ltd. Partnership v. Montgomery County Council, 259 Md. 661, 271A.2d 174 (1970),

"If that were the criteria of confiscation, zoning restrictions in many areas would collapse like a house of cards."

Accordingly, upon close examination, it appears that Petitioner's contention of error is unfounded. Moreover, since Petitioner has not alleged a substantial change in the neighborhood, he has not satisfied the first element required for statutory reclassification under Section 2-58.1(i)(1). It therefore should not be necessary for the Board to reach

(2) That the prospective reclassification of the property is warranted by that change or error. Any finding of such a change or error and any finding that the prospective reclassification is warranted may be made only upon consideration of factors relating to the purposes of the zoning regulations and maps, including, but not limited to, all of the following: Population trends; availability and adequacy of present and proposed transportation facilities, water-supply facilities, sewerage, solid-waste-disposal facilities, schools, recreational facilities, and other public facilities, compatibility of uses generally allowable under the prospective classification with the present and projected development or character of the surrounding area; any pertinent recommendation of the planning board or office of planning and zoning; and consistency of the current and prospective classifications with the master plan, the county plan for sewerage and water-supply facilities, and the capital program."

Accordingly, consideration of the present petition for zoning reclassification involves a two-step analysis: (1) application of the change-or-mistake rule; and (2) consideration of whether or not the requested reclassification is warranted.

the second element, involving the issue of whether D.R. 16 zoning is warranted by any error.

Were this issue to be reached, however, the Board should also find that there was no cogent evidence to support the D.R. 16 request. Petitioner failed to answer the expert testimony of James Hoswell that D.R. 16 would overcrowd the area and failed to present specific expert testimony to negate the evidence of the burden of additional traffic.

In this context, even assuming arguendo there were any error, it would be incumbent upon the Petitioner to consider alternative zoning classifications, such as D.R. 10.5, R-O, O-1, and O-2. Such an analysis would be prerequisite to a finding that D.R. 16 is the suitable zoning classification and is warranted by the evidence. Otherwise stated, the Petitioner did not substantially address the requirements of Section 2-58.1(i)(2).


X. CONCLUSION

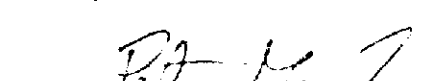
Upon review of the record, it appears:

1. There is no error.

2. D.R. 16 zoning is not warranted.

The Petition should, therefore, be denied.


John W. Hession, III
People's Counsel for Baltimore County


Peter Max Zimmerman
Deputy People's Counsel
Rm. 223, Court House
Towson, Maryland 21204
494-2168

I HEREBY CERTIFY that on this 16th day of March, 1982, a copy of the foregoing Memorandum of People's Counsel was mailed to Robert A. DiCicco, Esquire, 405 Central Avenue, Towson, Maryland 21204, Attorney for Petitioner.

Peter Max Zimmerman
Peter Max Zimmerman

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BALTIMORE COUNTY
HALL BUILDING
COUNTY CLERK
DEPT. 1

"Surely all the testimony and evidence produced for this Board's consideration in two full days of hearing could in no way have been available to the Council who had to consider literally hundreds and hundreds of parcels of land." (Opinion page 2).

But, as will be seen below, the Council is presumed to have been aware of all pertinent facts in the absence of evidence to the contrary. This property having been before the County Council in 1976, that presumption is reinforced.

The Board did not attempt to recapitulate all the facts. It placed emphasis on the proximity of the Security Industrial Park and existing townhouses and apartments across Rolling Road to the "east" (actually west), but conceded substantial D.R. 5.5 development to the south. The Board acknowledged the successful sale of Mrs. Appleby's property, yet gave undue weight to the inability of Petitioner to sell his property (conveniently omitting the fact that his asking price was \$540,000).

The Board conceded that to grant D.R. 16 to this parcel alone could have a domino effect in the area and that this type of zoning "is better accomplished comprehensively." Moreover, the Board acknowledged the "heavy" traffic in the area, and understood that there was "clearly no issue of confiscation as the property could be developed within its present zoning."

Nevertheless, the Board of Appeals seemed to feel that D.R. 16 would be a reasonable buffer or "transition use area" between the industrial park and the development of single family homes to the south. Despite the absence of any clear or persuasive evidence, the Board suggested "that to sell individual lots abutting a huge industrial park would be highly unlikely."

Finally, after referring to legal decisions seemingly in favor of as well as opposed to the petition, the Board reached, as "a last resort," to the "motto displayed in our courtroom, 'Reason is the life of the law,'" and concluded that "reason" dictated the provision of some transitional use. In so doing, the Board was clearly wrong to substitute its judgment for that of the County Council.

THE PEOPLE'S COUNSEL FOR
BALTIMORE COUNTY, et al.,
Appellants
v.
COUNTY BOARD OF APPEALS, et al.,
Appellees
Truman Grabill

IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY
AT LAW
Misc. #82-M-143

APPELLANTS' MEMORANDUM

People's Counsel for Baltimore County, Appellant, pursuant to Maryland Rule B12, files the following memorandum:

On April 29, 1982, the County Board of Appeals entered an Opinion and Order granting to the Appellee his request for zoning reclassification from D.R. 5.5 to D.R. 16. The property in question has a long history, dating back to the 1976 Comprehensive Zoning process, a prior petition for reclassification filed in 1978, the 1980 Comprehensive Zoning process, and finally, the current petition. The County Council, the Planning Board, and the Board of Appeals have, in the last six years, each acted on the matter at least twice. The history, the description of the property and neighborhood, and the major points for and against the subject petition were argued at length in memoranda filed before the County Board of Appeals. Accordingly, in order to avoid undue repetition, both the People's Counsel's Memorandum and the Petitioner's Memorandum are attached hereto and prayed to be incorporated herein as Exhibits A and B.

A review of the record shows that the County Council in 1980 focused on the subject property as a specific issue, was familiar with the prior litigation, and made a well-considered decision to designate the zoning as D.R. 5.5. The subject 13.7 acre tract, with a dwelling and farm buildings, lies in a quadrant of approximately 100 acres, all zoned D.R. 5.5, in the area east of Rolling Road and north of Dogwood Road in western Baltimore County. The tract itself is in the northwestern portion of this quadrant, fronting on Rolling Road. The immediate neighborhood contains primarily a mix of residentially zoned land both developed and vacant, as well as the Security Industrial Park. The County Council was familiar with the area and chose to retain the quadrant in which the subject

Pursuant to Section 2-58.1(1) of the Baltimore County Code, "consideration of the petition for zoning reclassification involves a two-step analysis:

- (1) Application of the change or mistake rule; and
- (2) Consideration of whether or not the requested reclassification is warranted.

Turning to the important applicable zoning principles, "...perhaps none is more rudimentary than the strong presumption of the correctness of original zoning and of comprehensive rezoning." Otherwise stated, "...strong evidence of error is required to make the issue or mistake in comprehensive zoning fairly debatable and unless such strong evidence is presented by the applicant, the action of the Board in granting a reclassification is arbitrary and capricious." *Boyce v. Sembly*, 25 Md. App. 43, 334 A.2d 137 (1975).

Moreover, as the issue of confiscation is often interrelated with mistake, it need be stated that,

"Applicant must show that he has been deprived of all reasonable use of his property and that it cannot be used for any of the permitted uses in the existing zone." *Stratakis v. Seouchamp*, 268 Md. 643, 304 A.2d 244 (1973).

In the present case, the applicant quite simply failed to meet the burden to present evidence that the County Council ignored specific facts material to the zoning, failed to take undisputed facts into consideration, or caused a deprivation of all reasonable use of the property.

The recent decision in *Howard County v. Dorsey*, 292 Md. 351, 438 A.2d 1339 (1982), is in point. There, the Petitioner contended the property unsuitable for residential development because "practically surrounded by industrial zoning classifications." He further contended that no reasonable use could be made because the approximately 15 acres of land zoned R-12 were "in a sea of hundreds and hundreds of acres of industrially zoned land." The Court of Appeals rejected both contentions. It found the allegation of unsuitability based on "industrial surrounding," not sufficiently strong or substantial to overcome

*The full text is reproduced at pages 7-8 of the attached Memorandum of People's Counsel.

site is located as medium density residential,*

County Planner James Hoswell reviewed the site and neighborhood, the 1980 Comprehensive Map history, and the mix of uses in the neighborhood. He testified unequivocally that the designation of D.R. 5.5 for the subject site, as well as the quadrant in which it is located, is appropriate. He also underlined the valid consideration that D.R. 16 zoning could reasonably be thought to overcrowd an area already subject to intense development and trigger a domino effect (Tr. 230-64).

The Petitioner placed great stress on the proximity of the Security Industrial Park, and also sought to persuade the County Board of Appeals that development costs would be prohibitive at D.R. 5.5. In this connection, Engineer Paul Lee estimated the cost for public improvements at approximately \$9100 per unit, assuming the need to provide a 2100' sewer connection to Dogwood Road. The cost would be \$7300 per unit if sewer costs were undertaken by intervening landowners. Lee's testimony is found at pages 17-85. His computations were introduced as Petitioner's Exhibit H. Taking Lee's estimates, real estate man Frederick Klaus testified that these development costs were so high as to prevent feasible marketing. He opined that normal per unit development public cost was approximately \$3500 (Tr. 116-66). On close examination, he refused to testify to any profit margin assumed or to any specific detailed cost budget or revenue analysis.

The combined testimony of Lee and Klaus were rebutted by both J. Carroll Hagen, an experienced engineer and consultant in land development, and Robert Morton, Chief of the County Bureau of Public Services (Tr. 174-223). Hagen said that public development costs per unit for residential development in the County average about \$8000, that Lee's estimated

*The Court may get a better idea of the location and surroundings by reviewing the text and accompanying map constituting the recommendation of the Planning Board on the subject petition, attached hereto as Exhibit C (Tr. Ex. 4). The People's Counsel also introduced as exhibits documentation reflecting consideration of the subject property by the Planning Board and County Council during the 1980 Comprehensive Zoning process (Tr. P. C. Ex. 2-3).

the presumption of validity of comprehensive zoning. It further noted no evidence to show the Council was unaware of the readily visible physical characteristics and location of the subject property or failure to take them into account. The Court further rejected the confiscation argument, noting the existence of a single family residence presently on the property and the existence of single family development on property adjacent to the north.

In the present case, Petitioner's factual premise that his land is surrounded by industry or commerce is incorrect. Even if it were factually accurate, however, it would not be sufficient to support rezoning under *Dorsey*. Petitioner's contention regarding confiscation is strikingly similar to that rejected in *Dorsey*, considering the existence of a single family dwelling and farm houses, and the substantial residential development on nearby property. Petitioner's further attempt to establish confiscation by reference to analysis of development costs should similarly be rejected. It was based on the premise that \$3500 per unit public costs for residential development is normal and reasonable, and that public costs in the area of \$7300 to \$9100 are disproportionate. The hard facts showed, however, that such costs are typical for current residential development in Baltimore County. Petitioner absolutely failed, by hard analysis, to show either the absence of the suitability of existing residential use, or the unfeasibility of new development.

Petitioner's other primary thrust was to urge the theory that the requested D.R. 16 zoning would provide an appropriate buffer against the Security Industrial Park. The so-called "buffer" theory has been tried and rejected in many cases. See, for example, *Dahl v. County Board of Appeals*, 258 Md. 157, 265 A.2d 227 (1970), in which the Court stated,

"Hindsight might dictate that Ridenwood-Lutherville Drive may have been a better choice for the boundary between M-L zone and the residential zone; however, this desirability falls far short of substantiating its adoption as error." 258 Md., at 164, 265 A.2d, at 231.

Analogously, in a case involving the division between residential and commercial zoning, the Court said,

development costs for Petitioner, whether \$9100 or \$7300 per unit, were in line with normal costs around the County, and that residential development in any event normally awaits availability of public utilities at the site boundary. Morton demonstrated from actual costs in recent residential subdivisions, based on public works agreements, that per lot costs range from \$6854 to \$11,324. This cost range applied regardless of location, size of tract, zoning, or selling price.

Petitioner presented other testimony from Lee on public services, but none pertinent to the reclassification. Generally speaking, public utilities would be available whether under D.R. 5.5 or D.R. 16. If anything, the D.R. 16 would pose greater problems because of a serious question as to the adequacy of neighborhood roads (Report of Michael Flanigan, Assistant Traffic Engineer). Lee also testified to the unsuitability of the property for designated Special Exception uses in D.R. 5.5, but omitted to mention that the same uses were listed for D.R. 16. Significantly, the Petitioner, Truman Grabill, admitted that in his opinion the property under the existing D.R. 5.5 classification is worth \$540,000 (Tr. 85-116, at 91-93). Grabill admitted that he was aware that the property was an issue in the 1980 Comprehensive Zoning process but did not attend, personally or through any representative, the County Council hearing. His counsel did participate by writing a letter to Councilman James Smith on October 3, 1980 (Tr. P. C. Ex. 5). Significantly, neighbor Virginia Appleby, Petitioner's witness, admitted that she had recently sold her property under the D.R. 5.5 classification (Tr. 166-68).

The County Board of Appeals, in its opinion, stated its awareness "of the presumption of the correctness of original zoning and of comprehensive zoning, and that further evidence of error is required to make the issue of mistake in comprehensive zoning debatable." Nevertheless, the Board wrongfully professed to be "required to project itself into the reasoning of the County Council and either affirm or amend its decisions without knowledge of what information was available to the Council when its decision was made." As the Board put it,

"Zoning inevitably involves the drawing of lines, ...and the Council was not bound to extend a commercial classification beyond the lot where it elected to stop." *Montgomery County v. Pleasant*, 266 Md. 462, 467, 295 A.2d 216, 219 (1972).

Most recently, in a case arising before the County Board of Appeals, which granted the reclassification, the Court of Special Appeals reviewed and rejected the buffer theory in *People's Counsel for Baltimore County v. Frey*, (No. 1352, September Term, 1980).

Petitioner's other arguments, listed as A-E on Page B of its Memorandum to the Board of Appeals, are factually and legally inadequate. Security Square Mall is outside the pertinent neighborhood, irrelevant to the precise zoning issue, and in any event, not unfamiliar to the County Council. The status of Lord Baltimore Drive, with an uncertain completion date, is similarly irrelevant and, in any event, within the Council's knowledge. The high development cost argument has been shown empty. The matter of Circuit Court proceedings on the prior reclassification is immaterial to the new reclassification and, again, was known by the Council. As to the alleged unappealable grant of D.R. 16 zoning at the time of Council retirement of the current issue, this is simply not true. The People's Counsel did in fact appeal.

As in so many cases, the Petitioner implies that the Council acted on misinformation without specific evidence. The Petitioner ignores that the County Council is presumed to have awareness of all relevant facts. The burden of proof is on the Petitioner, not on the County. Petitioner's contentions are particularly objectionable in this case because the allegations themselves are factually incorrect.

As to the confiscation argument, again, the Petitioner's argument, as a practical matter, admits to no more than the increased profitability resulting from a grant of the rezoning. As Judge Smith stated, however, in *Cabin John Ltd. Partnership v. Montgomery County Council*, 259 Md. 661, 271 A.2d 174 (1970),

"If that were the criteria of confiscation, zoning restrictions in many areas would collapse like a house of cards."

Accordingly, upon close examination, it appears that Petitioner's contention of error is unfounded. Moreover, since Petitioner has not alleged a substantial change

in the neighborhood, he has not satisfied the first element required for statutory reclassification under Section 2-58.1(j)(1). It therefore should not be necessary for the Board to reach the second element, involving the issue of whether D.R. 16 zoning is warranted by any error.

Were this issue to be reached, however, the Board should also find that there was no cogent evidence to support the D.R. 16 request. Petitioner failed to answer the expert testimony of James Hoswell that D.R. 16 would overcrowd the area and failed to present specific expert testimony to negate the evidence of the burden of additional traffic.

In this context, even assuming *arguendo* there were any error, it would be incumbent upon the Petitioner to consider alternative zoning classifications, such as D.R. 10.5, R-O, O-1, and O-2. Such an analysis would be prerequisite to a finding that D.R. 16 is the suitable zoning classification and is warranted by the evidence. Otherwise stated, the Petitioner did not substantially address the requirements of Section 2-58.1(j)(2).

Here, despite its recognition of the strong presumption of correctness of comprehensive zoning, the County Board of Appeals stood the applicable legal standard on its head by assuming, without evidence, that the County Council was unaware of the readily visible physical characteristics, location, and neighborhood of the subject property and unaware of other facts pertinent to the reclassification. But the record shows that the property came before the County Council in 1976 and 1980, that the property was specifically designated in the 1980 Planning Board and County Council documents and reports, that the earlier reclassification petition further called attention to the subject property, and that the Council made a deliberate decision to designate D.R. 5.5 zoning. The Petitioner himself chose not to testify before the Planning Board or the County Council to state any facts or reasons in support of the requested D.R. 16 classification. This failure cannot legally be turned to the Petitioner's advantage by presuming the Council then to have been unaware of relevant facts or to have failed to take such facts into consideration. Therefore, the Board of Appeals'

its environment, Exhibit J. The site was also detailed for the Board in map Exhibits E, F, and G; color photograph Exhibits B and C collectively; and in Exhibit A, Plat prepared for the zoning application by expert witness, Paul Lee.

In brief, the site was described as bounded on the north and east by the 280-acre Security Industrial Park with such industries or employers as the Baltimore Gas and Electric Co., the F.B.I., Barre International Corporation, C & P Telephone Co., Eastman Kodak, MCEEA, and a host of office tenants at The Rutherford Plaza Office Center. Several thousand yards to the south is the Security Square Mall, a major regional shopping center with four major national retailers and a host of specialty stores. Also, there are two national motel chains, another 55-acre industrial office park with numerous tenants and an extensive apartment complex, Quail Meadows.

On the west, directly opposite the site, are two townhouse apartment complexes, Heraldry Square and Kingswood Common, totaling approximately 700 units. Some of the units are individually owned townhouses selling at approximately \$39,000.00 - \$41,000.00.

Mr. Lee testified that the property was serviced by, or had available to it adequate roads, public transportation, schools and other public services. In his opinion D.R. 5.5 was an improper zone for the site because present zoning regulations, topography and development costs rendered the land impossible for residential development for anything less than D.R. 16 density. He added that even though B.C.ZR regulations 1 B01.1 A-C permitted other uses such as farming, churches, hospitals, schools, grave yards, etc., none of those uses were possible on the site.

In support of his opinion he prepared a development cost estimate for public improvements for the theoretical maximum number of units allowed under the D.R. 5.5 zone. His estimate, Exhibit H, revealed that the average cost per unit for the public improvements only, excluding land costs, building and sales costs, was approxi-

finding of error was based on a false premise.

Its Opinion reveals, moreover, that the Board arrogated unto itself the legislative role of judging the preferred zoning for the property. In so doing, the Board failed to adhere to the limitations which the law imposes on administrative bodies reviewing legislative decisions. Specifically, the Board opined that there ought to be a transition area between D.R. 5.5 and the industrial land to the east. Without evidence, the Board suggested that the "buffer" was necessary because single family homes would not be built near the industrial park. But there was no evidence of any planning theory which requires D.R. 16 zoning next to industrial (or prohibits D.R. 5.5), and no evidence that single family homes could not or would not be built. In any event, D.R. 5.5 zoning does not limit a property owner to the construction of single family homes.

The Board recognized that there was no legitimate question of confiscation in the case and that the property owner was provided a reasonable use. Nevertheless, in finding error, the Board decided to exceed the proper boundaries of its function and make the kind of decision which is reserved to the legislature.

Finally, without any factual basis, the Board also determined that the requested D.R. 16 classification was warranted. In this context, the Board's failure to consider alternative zoning classifications was a fatal omission. Perhaps this omission is understandable because the Petitioner did not substantially address the issue. While understandable, it nevertheless is another reason for reversing the Board's decision.

Upon review of the record, it appears:

1. There is no error.
2. D.R. 16 zoning is not warranted.
3. The Opinion of the Board of Appeals was not supported by substantial evidence, and was based upon false premises and erroneous interpretation and application of the relevant legal standard.

mately \$9,100.00 per unit. He added, that in all probability, his estimate would be lower than actual cost because, (a) based upon his previous experience as the Developmental Engineer for Security Industrial Park, excavation at that site was plagued with underground rock, therefore, in all probability the Crabill site would face the same plight, and be subject to increased excavation costs; (b) the developer would have to pay for the extension of acquisition of rights-of-way for sewer and storm drains to the site, approximately 2,100 feet, thereby adding additional cost.

It was his expert opinion it was not possible to acquire the land, build and sell a townhouse on the site for \$40,000.00 if the development costs, alone, were \$9,100.00 per unit. However, if the density was increased to D.R. 16, the per unit development cost would be substantially reduced, because development would be spread over more lots. This would reduce the projected sales price of any townhouse development, and bring it in line with the market.

Support for Mr. Lee's testimony came from the People's Counsel expert witness, J. Carroll Hagan, an engineer involved in land development. Mr. Hagan said that he was asked to review Mr. Lee's public costs development estimate, Exhibit H, and found that it was a reasonable estimate. He testified that based upon four of his current projects in Baltimore County, public services development costs for townhouse projects averaged \$8,000.00 per unit. In his opinion Paul Lee's \$9,100.00 per unit figure was not unreasonable.

The People's Counsel witness also gave support to Petitioner's claim that the high land development cost prevented development of the land for townhouses in the market range of \$40,000.00. According to Hagan, his example townhouse developments had development costs and sales prices as follows:

John W. Hession, III
John W. Hession, III
People's Counsel for Baltimore County

Peter Max Zimmerman
Peter Max Zimmerman
Deputy People's Counsel
Rm. 223, Court House
Towson, Maryland 21204
494-2188

I HEREBY CERTIFY that on this 16th day of July, 1982, a copy of the foregoing Appellants' Memorandum was mailed to Robert A. DiCicco, Esquire, 405 Central Avenue, Towson, Maryland 21204.

Peter Max Zimmerman
Peter Max Zimmerman

RECEIVED
BALTIMORE COUNTY
JUL 16 11 21 AM '82
CLERK OF COURT
BY: J. H. H.

PROJECT	PUBLIC SERVICE DEVELOPMENT COSTS	SALES PRICE (approx)
A	\$8,700.00 per unit	\$80,000.00
B	\$6,589.00 per unit	\$65,000.00
C	\$7,998.00 per unit	\$65,000.00
D	\$7,224.00 per unit	\$70,000.00

Applying Hagan's figures to the subject site, at the least, the Petitioner could anticipate that even with an \$8,000.00 per unit development cost, his unit salesprice would have to be \$65,000.00 or \$25,000.00 more than the market price as established by the townhouses across the street from the site.

The Petitioner's real estate expert witness, Frederick P. Klaus, testified that the County Council committed error when it failed to consider that the site could not be used for residential development at D.R. 5.5 because of the factors outlined by Mr. Lee. He also assigned error to the Council's action because it failed to consider the fact that the Board of Appeals had reclassified the property D.R. 16 after extensive hearing and that the Board's decision had been affirmed by the Circuit Court.

In support of this conclusion, the Petitioner introduced an October 7, 1980 letter from the Second District Councilman, Petitioner's Exhibit I, sent to Petitioner's attorney in response to Petitioner's October 3, 1980 complaint (See People's Counsel's Exhibit 5 introduced at December 9, hearing) that the Council had retired the issue without giving consideration to the affirmation of the Board of Appeals decision by Judge Buchanan.

It is clear from the Councilman's response that he only considered the Planning Staff and Planning Board recommendations and was not aware of Circuit Court's action. It should be noted that People's Counsel witness, James Hoswell of the Planning Staff, confirmed that the only official written information about the Board of Appeals action was in the Council Log (People's Counsel's

IN THE MATTER OF THE
PETITION FOR RE-CLASSIFICATION
OF
TRUMAN GRABILL
E/s Rolling Road
2,600' N of Dogwood Road
* * * * *

BEFORE THE
COUNTY BOARD OF APPEALS
* * * * *

Case No. R-82-80
* * * * *

PETITIONER'S MEMORANDUM

Statement of Case

This is Petitioner's Memorandum of law in support of his request for change of zoning to D.R. 16 of a 13.7 acre tract of land in the Second Election District of Baltimore County, zoned D.R. 5.5, but sandwiched between a fully developed 280-acre Industrial Park and a 700-unit D.R. 16 apartment complex.

Question Presented

Whether the Baltimore County Council committed error when it adopted the 1980 Comprehensive Zoning Map and classified the subject property D.R. 5.5.

Statement of Facts

The Petitioner is no stranger to this Board. On November 6, 1979 this Board acted on the identical request of Petitioner and changed the zoning of the subject property from D.R. 5.5 to D.R. 16. Although the Board's decision was upheld by the Circuit Court for Baltimore County and also not reversed by the Court of Special Appeals, nevertheless, the County Council, in adopting the 1980 Comprehensive Zoning Maps, failed to properly consider the Board's action, and the subsequent court affirmation but classified the property D.R. 5.5.

In the first day of hearings before the Board, December 9, 1981, the Petitioner exhibited a brief video tape of the site and EXHIBIT B

Exhibit 3, December 9, 1981 hearing) which contained no reference that the case had been affirmed by Judge Buchanan. On cross-examination, Mr. Hoswell admitted that although he accompanied the councilman on the bus tour of July 15, 1980, he did not advise the councilman that the Circuit Court had affirmed the Board of Appeals decision.

The Petitioner, Truman Grabill, a farmer, testified that his family had owned the property for over 30 years and had used the land for farming. He said that farming was no longer possible on the site because of the lack of available farm labor; the increased distance from farm markets which have moved; the small size of the acreage; and the loss of other farmland in the vicinity caused by development and urban sprawl. Furthermore, the site was no longer suitable as a single family residence because the high density residential development and the industrial park.

Appearing in favor of the Petitioner was Mrs. Virginia Appleby, the owner of a tract of land several hundred feet south of the subject tract.

There were no protestants to the granting of this application.

The only party to present testimony was the People's Counsel. Its first witness was Mr. Hagan, whose testimony has been discussed above, was supportive of the Petitioner. Also called was Robert Morton from the Public Works Department who introduced figures relating to county development costs. His testimony can be characterized as an elaboration of the testimony of Paul Lee and J. Carroll Hagan.

Richard Flanagan, traffic expert testified regarding the amount of trips expected to be generated if the site was zoned D.R. 16.

There was no testimony from this witness that such an increase would cause a hazard or otherwise unduly impact on the traffic conditions in the neighborhood. In fact he testified, in response to People's Counsel inquiry that the impact on the Beltway traffic at Security of the trips generated by the proposed zoning change at

THE PEOPLE'S COUNSEL FOR
BALTIMORE COUNTY
PETITION FOR RECLASSIFICATION
E/S Rolling Rd., 2600' N of
Dogwood Rd., 2nd District

THE
CIRCUIT COURT
FOR
BALTIMORE COUNTY

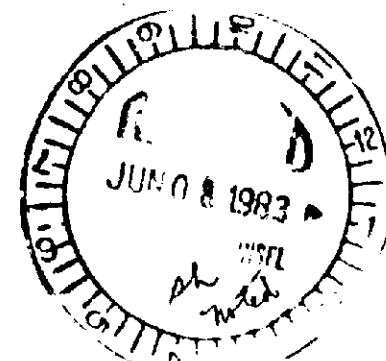
vs.
TRUMAN GRABILL, Petitioner
Zoning Case No. R-82-80 (Item 21)

LAW NO. 14/148/82-M-143

ORDER FOR APPEAL

Mr. Clerk:

Please note an Appeal on behalf of the Petitioner, Truman Grabill from the Opinion, Order and Judgment of the Honorable John E. Raine, Jr. in the Circuit Court for Baltimore County issued on May 13, 1983.



ROBERT A. DICICCO
405 Central Avenue
Towson, Maryland 21204
825-2000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of June, 1983, a copy of the foregoing Order for Appeal was mailed to: John W. Hessian, III, Esquire and Peter Max Zimmerman, People's Counsel for Baltimore County, room 223, Court House, Towson, Maryland 21204.

ROBERT A. DICICCO

MANDATE

Court of Special Appeals of Maryland

No. 801, September Term, 1983

Truman Grabill

vs.

People's Counsel for Baltimore County

April 26, 1984: Per Curiam filed. Judgment affirmed. Costs to be paid by appellant.

May 28, 1984: Mandate issued.

STATEMENT OF COSTS:

In Circuit Court: for Baltimore County

Record 30.00
Stenographer's Costs 45.00

In Court of Special Appeals:

Filing Record on Appeal 30.00
Printing Brief for Appellant 172.80
Reply Brief
Portion of Record Extract - Appellant
Printing Brief for Cross-Appellee

Printing Brief for Appellee 153.60
Portion of Record Extract - Appellee
Printing Brief for Cross-Appellant

STATE OF MARYLAND, Set:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this Twenty-eighth day of May

A.D. 1984
[Signature]

Clerk of the Court of Special Appeals of Maryland

THE PEOPLE'S COUNSEL FOR
BALTIMORE COUNTY
PETITION FOR RECLASSIFICATION
E/S Rolling Rd., 2600' N of
Dogwood Rd., 2nd District

IN THE
CIRCUIT COURT
FOR
BALTIMORE COUNTY

VS

TRUMAN GRABILL, Petitioner
Zoning Case No. R-82-80 (Item 21)

LAW NO. 14/148/82-M-143

OPINION

This Court is constrained to reverse the action of the Board of Appeals in reclassifying the subject property to D.R. 16. The property was originally classified in a comprehensive zoning action by the County Council as D.R. 5.5. There is a long line of cases holding that a presumption exists that original zoning was well planned and was intended to be more or less permanent. Before a Zoning Board rezones property, there must be proof of either some mistake in the comprehensive zoning or that there have been such changes in the neighborhood to an extent that reclassification ought properly to be made.

In the instant case the Board did not rely on evidence of a significant change in circumstances, but reclassified on the basis that there was a mistake when the County Council adopted the 1980 map. It was the opinion of the Board that it would be desirable to create a high density buffer zone that would set apart the lower density property from an adjacent commercial area. The Board concluded that because their view did not coincide with that of the Council, the latter had made a mistake when they adopted the map.

This Court cannot substitute its judgment for that of the Zoning Board, but it is arbitrary and illegal for the Zoning Board to substitute its judgment and opinion for that of the County Council. There is simply no evidence in this record to support a

TRUMAN GRABILL R-82-80
E/S of Rolling Rd. 2600' N of Item #21
Dogwood Rd. 2nd District
D.R. 5.5 to D.R. 16 13.70 acres

Feb. 27, 1981 Petition filed
Dec. 9, 81 Hearing held on petition
April 29, '82 C.B.A. GRANTED the reclassification
May 19, '82 Order for Appeal filed in Cir. Ct. by J. Hessian, (82-M-143) People's Counsel
May 19, " Petition for extension of time to file transcript
July 6, 1982 Record of Proceedings filed in Cir. Ct. for Baltimore County
May 13, 1983 Board REVERSED - Judge John E. Raine, Jr. cc [unclear] 6/3/83
June 6 Order for Appeal filed in the Court of Special Appeals by Robert A. DiCicco, Esq. for Petitioner cc [unclear] 6/13/83
Apr. 26, 1984 Board REVERSED by Court of Special Appeals 5/1/84 - cc: A. Jablon J. Hoswell
May 28 Mandate issued.
June 12 Writ of Certiorari filed in the Court of Appeals of Md. 6/18/84 - cc: A. Jablon A. January J. Hoswell
Oct. 2 Writ of certiorari DENIED by the Court of Appeals 10/10/84 - cc: A. January A. Jablon J. Hoswell

finding that the County Council's action amounted to a mistake that would warrant correction by reclassification. The exhibits make it clear that the County Council reviewed the report of the County Office of Planning, inspected the property and agreed with the planner's recommendation that the subject property should be maintained in a D.R. 5.5 classification. Just because there is a dispute with the Council's conclusion does not constitute a showing of original mistake. Several cases that are analogous are Hardesty vs. Board of Zoning Appeals, 211 Md. 172, where it was held that the property owner had not met the burden of proving original mistake where a lake existed in the middle of a residential zone which might well present a hazard to children living in the residential zone. In that case the Court held that reclassification was not justified on the basis of either mistake or change in circumstances. In Schiff vs. Board of Zoning Appeals, 207 Md. 365, property was originally classified as residential despite the fact that the property had been used as an airport originally and later for commercial use by Bendix Radio Corporation. It was held that it was not a mistake to have classified the airport property as residential. One of the few cases holding that the initial zoning was a mistake is Offutt vs. Board of Zoning Appeals, 204 Md. 551, but that case is clearly distinguishable. The property in question was near a railroad and the property devoted to commercial and industrial use. The Planning Commission was charged with finding desirable industrial sites and had recommended the suitability of the subject property for industrial use. When the County Commissioners zoned the properties for residential use they ignored the characteristics of the neighborhood as well as the Planning Commission's study and recommendation. That was held to be sufficient

-2-

proof of a mistake. The instant case is far different than the Offutt case. The property owner places great reliance on Bonnie View Country Club vs. Glass, 242 Md. 216. The facts in that case, supported by clear and uncontroverted evidence, were sufficient to meet the property owner's burden of proving mistake. The present case is far more akin to Boyce vs. Sembly, 25 Md.App. 43, where it was held that classification of property in a DR 5.5 zone was not a mistake despite the nearby location of a lumber yard and a heavy construction equipment company and a branch of the Northern Central Railway.

This Court now holds that the property owner has not met the burden of proving mistake and this necessitates reversal of the Order of the Board of Zoning Appeals granting the reclassification. This Court gratuitously observes that the property owner should appear and endeavor to persuade the County Council to change the classification of the subject property when it is next considered by the Council as a part of a comprehensive zoning action.

John E. Raine, Jr., Chief Judge

May 13, 1983

BALTIMORE COUNTY

ZONING PLANS

ADVISORY COMMITTEE



PETITION AND SITE PLAN

EVALUATION COMMENTS

BALTIMORE COUNTY ZONING PLANS ADVISORY COMMITTEE

April 25, 1981

COUNTY OFFICE BLDG.
111 W. Chesapeake Ave.
Towson, Maryland 21204

ooo
Nicholas B. Cowdell
Chairman

MEMBERS

Bureau of Engineering
Department of Traffic Engineering
State Roads Commission
Bureau of Fire Prevention
Health Department
Project Planning
Building Department
Board of Education
Zoning Administration
Industrial Development

Robert A. DiCicco, Esquire
203 W. Pennsylvania Avenue
Towson, Maryland 21204

RE: Item No. 21 (Cycle 1 - April-Oct. 1981)
Petitioner - Truman Grabill
Reclassification Petition

Dear Mr. DiCicco:

This reclassification petition has been timely filed with the Board of Appeals for a public hearing within the 1st 1980-81 zoning cycle.

The petition has been reviewed by the Zoning Office as to form and content and has also been reviewed by the Zoning Plans Advisory Committee.

The review and enclosed comments from the Committee are intended to provide you and the Board of Appeals with an insight as to conflicts or problems that could arise from the requested reclassification or uses and improvements that may be specified as part of the request. They are not intended to indicate the appropriateness of the zoning action requested.

If it has been suggested that the petition forms, description, briefs, and/or the site plans be amended so as to reflect better compliance with the zoning regulations and commenting agencies' policies, you are requested to review these comments, make your own judgment as to their accuracy and submit the necessary amendments to this office before May 29th. In the event that any requested amendments are not received prior to this date, the petition will be advertised as originally submitted.

Located on the east side of Rolling Road approximately 2,600 feet north of Dogwood Road in the 2nd Election District, the subject property consisting of 13.7 acres, zoned D.R. 5.5, is improved with a number of farm buildings. Adjacent properties to the north and south are improved with individual dwellings while apartments exist to the west across Rolling Road.

Because of your client's proposal to rezone this property to a D.R. 16 classification this petition is required. A similar request for this property was granted as a result of Case No. 79-54-R. However, with the adoption of the most recent comprehensive zoning maps, the D.R. 5.5 classification was restored.

the site would be inconsequential.

James Hoswell testified regarding the wisdom of the D.R. 5.5 classification. He told the Board good planning theory favored high density residential zones as a buffer between low density D.R. 5.5 residential zones, and commercial or industrial zones such as Security Industrial Park. However he stated that "we live in an imperfect world" and that textbook models could not always be achieved. The main reason he ascribed as to why the zoning should remain unchanged was because a re-classification might precipitate increases in intensity of development in the area.

Mr. Hoswell failed to point out, however, that increased development would be harmful or detrimental to the neighborhood.

In short, there was no testimony that re-classification of the site from D.R. 5.5 to D.R. 16 would be detrimental to the health, safety, or welfare of the neighborhood.

Argument

I

THE COUNTY COUNCIL COMMITTED ERROR WHEN IT ZONED THE SUBJECT PROPERTY D.R. 5.5 INSTEAD OF D.R. 16.

In the landmark case of Wakefield vs. Kraft, 202 Md. 136 (1953), the Court of Appeals announced the legal test to be applied in re-zoning cases that

"... in order to justify a change in zoning, it must appear, therefore, that either there was a mistake in the original zoning or that the character of the neighborhood was changed to an extent which justified the amendatory action."

In Jobar Corporation vs. Rodgers Forge Community Association, 236 Md. 106, 202 A.2d 612 (1964), the Court of Appeals upheld the Board's decision to rezone six acres on Stevenson Lane 1,000 feet west of York Road which was bounded on north by 400-acre tract of extensive hospital development (Sheppard-Pratt & Greater

[6]

regulations and development rules the site could only produce as a theoretical maximum 75 units or lots and that the cost of land development for them was \$9,100.00 per lot; and when the cost of building alone was added, it was clear that such a development would be a loss situation. More importantly, however, he allowed as how the development costs would probably be higher because of rocky terrain and additional costs for sewer easements. Based on the current market for townhouses in the area, approximately \$40,000.00, the conclusion was inescapable that the property could not reasonably be developed at D.R. 5.5.

Not only was there un rebutted evidence that the property could not be developed for residential use under D.R. 5.5 but there was un rebutted testimony from experts that ancillary uses such as farming, funeral homes, etc. whether permitted by right or specific exception could not reasonably be made at this site. Cf., Coppolino vs. Board, 23 Md. App. 358, 328 A.2d 55 (1974).

In light of this overwhelming testimony establishing the confiscatory nature of the zoning, based upon strong factual basis and evidence, to which not even a scintilla of testimony was offered in rebuttal, it is clear that the Petitioner established that the property cannot be used for any reasonable purpose and therefore the zoning of D.R. 5.5 must be regarded as confiscatory.

Respectfully submitted,

ROBERT A. DICICCO
405 Central Avenue
Towson, MD 21204
825-2000

Baltimore Medical Center); on west by extensive row-home development of Rodgers Forge; on east by sharp slope to stream beyond which was older residential subdivision of Yorktown; on south by Stevenson Lane and more Rodgers Forge; from R. 6 (individual houses) to R.A. Apartment zone because of change in the neighborhood and mistake in the original zoning. In support of reclassification, the Court approved the proponents' expert land planner's testimony: that the council erred in failing to consider need for additional apartments in the area; in failing to consider impact of development of Sheppard-Pratt Hospital complex; that in view of the topography, reasonable economic use of the property was denied by R. 6 zone, which testimony support a finding of error.

In Board vs. Oak Hill Farms, Inc., 232 Md. 274, 192 A.2d 761 (1965), involving request to rezone 21-acre zoned medium density to high density apartment zone, the site was bounded on north and east by general commercially developed, the south by medium density residential, and the west by land zoned high density; the Court reversed a denial of rezoning because evidence showed there was error: in failing to consider the need for apartments generated by the adjacent land used for commercial; in failing to consider that topography of land made it impractical if not impossible of developing the land at the current zone. The Court also pointed out that the Protestants' "rationalizations" failed to rebut factual testimony presented by Petitioner.

In Overton vs. Board, 225 Md. 212, 170 A.2d 172 (1961) where subject site of 40 acres was bounded by property zoned detached residential on east; commercial on south; rural residential on north and west, and the zoning request was to low density from rural residential, the Court found that there had been error in the original zoning because evidence showed that topography and drainage made land unsuitable for use as detached dwellings but that low density residential was the best feasible use.

In Dill vs. Jobar Corporation, 242 Md. 16, 217 A.2d 564, the

[7]

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of February, 1982, a copy of the foregoing Petitioner's Memorandum was mailed to: People's Counsel, 400 Washington Avenue, Towson, MD 21204.

ROBERT A. DICICCO
405 Central Avenue
Towson, MD 21204
825-2000
Attorney for the Petitioner

BALTIMORE COUNTY
JAN 15 11 21 AM '82
CLERK
BR

Court affirmed a reclassification of a five-acre tract from residential to business based upon error, where evidence showed: that the land on the north, south, and east of property was zoned commercial; that an expert land planner established that council erred in not recognizing incompatibility of the current zone with surrounding land use; that the land was unsuitable for residential or office use.

Likewise, in the case at bar, the subject property is flanked by intensive and substantial high density residential development directly across the street and a major 280-acre industrial office complex behind it. A recognized expert engineer and realtor have established that there was error in the original zoning because:

A. The Council failed to consider the impact of The Security Square Mall, one of Baltimore County's largest regional shopping centers, the new industrial and business major development at Rolling Road and Security Boulevard and The Security Industrial Park as creating a need for more apartment land.

B. The Council failed to consider that the developing road pattern through the industrial park would relieve Rolling Road traffic and that the subject site offered a connecting route for same.

C. The Council did not consider that this site, because of high development costs, could not be used for current zone.

D. The County Council was unaware that the Circuit Court for Baltimore County had reviewed the proceedings of the fully developed Board of Appeals hearing in this matter and affirmed the Board.

E. Because the County Council retired the matter as an issue prematurely, it was not aware that at the time its map legislation took effect the Petitioner had a final unappealable grant of D.R. 16 zoning.

In contrast to the factual evidence of the Petitioner is the testimony of Planning Department witness that although a grant of

[8]

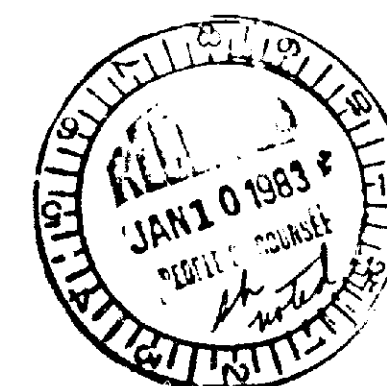
RE: PETITION FOR RECLASSIFICATION
E/S Rolling Road, 2600' N of
Dogwood Road, 2nd District
TRUMAN GRABILL, Petitioner
Zoning Case No. R-82-80
(Item 21)
IN THE
CIRCUIT COURT
FOR
BALTIMORE COUNTY
82-M-143

ORDER

Oral Motion Ne Recipiatur of People's Counsel for failure to comply with revised Maryland Rule B.12 having been heard and considered September 27, 1982, and ruling thereon having been reserved pending decision of Case No. 231 September Term 1982 in the Court of Special Appeals, People's Counsel v. Public Service Commission, et al., and in accordance with the decision of that case the said Motion Ne Recipiatur is denied and the appeal shall be assigned a trial date by the Assignment Commissioner of this Court.

Dated: January 5, 1983

Copies sent to:
June Holmen, Esquire
Peter Max Zimmerman, Esquire
Robert A. DiCicco, Esquire
Assignment Office



D.R. 16 zoning might be proper planning, he was not in favor because it might open the door to increased land use. But no witness testified that such a result would be bad for the community.

Applying the test set forth in Wakefield and against the factually congruity of the Oak Hill, Overton, Rodgers Forge, and Dill cases it is clear that the Petitioner has presented sufficient evidence to overcome the presumption of validity in the original zoning and has established that the Council committed error in failing to zone this site D.R. 16.

II

THE ZONING OF THIS SITE D.R. 5.5 IS CONFISCATORY

The legal principles applicable to the taking of private property without payment of just compensation by zoning action have been set out by the Court of Appeals in Mayor vs. Borinsky, 239 Md. 611, 622; 212 A.2d 508, 514 (1965):

"The legal principles whose application determines whether or not the restrictions imposed by the zoning action on the property involved are an unconstitutional taking are well established. If the owner affirmatively demonstrates that the legislative or administrative determination deprives him of all beneficial use of the property, the action will be held unconstitutional. But the restrictions imposed must be such that the property cannot be used for any reasonable purpose. It is not enough for the property owners to show that the zoning action results in substantial loss or hardship."

In Baltimore vs. Cohn, 204 Md. 523, 162 A.2d 447 where property had been zoned residential but evidence established that the tract was adaptable only for commercial or industrial purposes, zoning was arbitrary and unreasonable and deprived owner of property without due process of law. Cf. Dill vs. Jobar Co., supra.

In this case Mr. Paul Lee, an acknowledged engineering and zoning expert gave un rebutted testimony (which was supported by the People's Counsel expert) that because of the current zoning

[9]

RE: PETITION FOR RECLASSIFICATION
E/S Rolling Road, 2600' N of
Dogwood Road, 2nd District
TRUMAN GRABILL, Petitioner
Zoning Case No. R-82-80
(Item 21)
IN THE
CIRCUIT COURT
FOR
BALTIMORE COUNTY
82-M-143

ORDER

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Dated: January 5, 1983

Copies sent to:
June Holmen, Esquire
Peter Max Zimmerman, Esquire
Robert A. DiCicco, Esquire
Assignment Office

AUSTIN W. BRIZENDINE, Judge

BALTIMORE COUNTY
JAN 7 11 21 AM '83
CLERK
BR

Item No.21 (Cycle I - April-Oct. 1981)
Arthur P. Grau, et al
Reclassification Petition

As originally submitted, the site plans indicated proposed apartment development. After conversation with your engineer, concerning documented site plans as required by Bill 46-79, the plans were revised to delete this proposed use.

If you have any questions concerning the enclosed comments, please feel free to contact me at 494-3391. Notice of the specific hearing date, which will be between September and December of 1981, will be forwarded to you in the future.

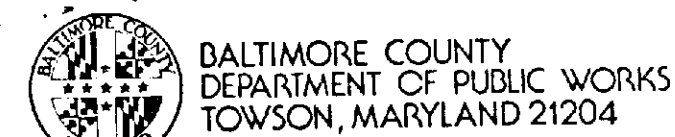
Very truly yours,

Nicholas B. Commodari
NICHOLAS B. COMMODARI
Chairman
Zoning Plans Advisory Committee

NBC:bse

Enclosures

cc: Paul Lee Engineering, Inc.
206 Washington Avenue
Towson, Maryland 21204



HARRY J. PISTEL, P.E.
DIRECTOR

April 3, 1981

Mr. Walter A. Reiter, Jr.
Chairman, Board of Appeals
Court House
Towson, Maryland 21204

Re: Item #21 (Cycle I - April-October 1981)
Property Owner: Truman Grabill
E/S Rolling Rd., 2,600' N. of Dogwood Rd.
Existing Zoning: D.R. 5.5
Proposed Zoning: D.R. 16
Acres: 13.7 District: 2nd

Dear Mr. Reiter:

The following comments are furnished in regard to the plat submitted to this office for review by the Zoning Advisory Committee in connection with the subject item.

General:

The comments which were supplied in conjunction with the Zoning Advisory Committee review of this property for Item #4 Zoning Cycle III (April-October 1978) are referred to for your consideration.

This office has no further comment in regard to the plan submitted for Zoning Advisory Committee review in connection with this Item #21 Cycle I (April-October 1981).

Very truly yours,

Robert A. Norton
ROBERT A. NORTON, P.E., Chief
Bureau of Public Services

RAM:EAM:FWR:ss

cc: Jack Wimbley

L-NE Key Sheet
11 & 12 NW 27 & 28 Pos. Sheets
NW 3 G Topo
87 Tax Map

Attachment

April 18, 1978

Mr. E. Eric DiNenna
Zoning Commissioner
County Office Building
Towson, Maryland 21204

Re: Item #4 (Cycle III April-October 1978)
Property Owner: Truman Grabill
E/S Rolling Rd. 2600' N. Dogwood Rd.
Existing Zoning: D.R. 5.5
Proposed Zoning: D.R. 16
Acres: 13.7 District: 2nd

Dear Mr. DiNenna:

The following comments are furnished in regard to the plat submitted to this office for review by the Zoning Advisory Committee in connection with the subject item.

Highways:

Rolling Road, an existing County road, is proposed to be further improved as a 50-foot closed section roadway on a 70-foot right-of-way. Highway right-of-way widening, including any necessary reversible easements for slopes, will be required in connection with any grading or building permit application.

If the proposed roadway is to extend beyond this site, it must be constructed as indicated, to County Standards, as a public road.

The entrance locations are subject to approval by the Department of Traffic Engineering, and shall be constructed in accordance with Baltimore County Standards.

Sediment Control:

Development of this property through stripping, grading and stabilization could result in a sediment pollution problem, damaging private and public holdings downstream of the property. A grading permit is, therefore, necessary for all grading, including the stripping of top soil.

Storm Drains:

Provisions for accommodating storm water or drainage have not been indicated on the submitted plan.

Item #4 (Cycle III April-October 1978)
Property Owner: Truman Grabill
Page 2
April 18, 1978

Storm Drains: (Cont'd)

Drainage and utility easements will be required through this site.

The submitted plan indicates that this site is within the Dead Run-Gwynns Falls Drainage Area; whereas, approximately one-third of the property is in the Ben's Run-Petapasco River Watershed.

Water and Sanitary Sewer:

There is a public 16-inch water main in Rolling Road. The submitted plan does not indicate the proposed method of providing public sanitary sewerage to this site, which will require offsets right-of-way.

Public sanitary sewerage exists in Hithergreen Drive, a private road, approximately 150 feet west of Rolling Road, and in Rolling Road approximately 120 feet north of Tudsbury Road (constructed in conjunction with the development "Section I Kingswood Common").

Public sanitary sewerage exists in Lord Baltimore Drive, approximately 1,000 feet east of this site and in Dogwood Road, approximately 2,000 feet north of this site; this sewerage is tributary to the Dead Run-Gwynns Falls Sanitary Sewer System.

Very truly yours,

Ellsworth H. Diver
ELLSWORTH H. DIVER, P.E.
Chief, Bureau of Engineering

ED:EAM:FWR:ss

cc: J. Trenner
J. Somers

L-NE Key Sheet
11 & 12 NW 27 & 28 Pos. Sheets
NW 3 G Topo
87 Tax Map



STEPHEN E. COLLINS
DIRECTOR

March 30, 1981

Mr. Walter A. Reiter, Jr.
Chairman, Board of Appeals
Office of Law
Courthouse
Towson, Maryland 21204

Item No. 21 - ZAC meeting of March 16, 1981
Property Owner: Truman Grabill
Location: E/S Rolling Road 2,600 n. of Dogwood Road
Existing Zoning: D. R. 5.5
Proposed Zoning: D. R. 16
Acres: 13.7
District: 2nd

Dear Mr. Reiter:

The existing zoning for this site is expected to generate approximately 750 trips per day and the proposed D. R. 16 zoning will generate approximately 1,640 trips per day.

Very truly yours,

Michael S. Flanigan
Michael S. Flanigan
Engineer Associate II

MSF/bza



DONALD J. ROOP, M.D., M.P.H.
DEPUTY STATE & COUNTY HEALTH OFFICER

April 6, 1981

Mr. Walter Reiter, Chairman
Board of Appeals
Office of Planning and Zoning
County Office Building
Towson, Maryland 21204

Dear Mr. Reiter:

Comments on Cycle I, #21, Zoning Advisory Committee Meeting of March 16, 1981, are as follows:

Property Owner: Truman Grabill
Location: E/S Rolling Road 2,600 N. of Dogwood Road
Existing Zoning: D.R. 5.5
Proposed Zoning: D.R. 16
Acres: 13.7
District: 2nd

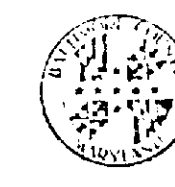
The proposed development must be served by metropolitan water and sewer. Connection to metropolitan sewer is subject to the Gwynns Falls Sewer Moratorium.

The zoning plan as submitted, does not contain sufficient information; therefore, the Baltimore County Department of Health cannot make complete comments.

Very truly yours,

Ian J. Forrest
Ian J. Forrest, Director
BUREAU OF ENVIRONMENTAL SERVICES

LJF/als



BALTIMORE COUNTY
FIRE DEPARTMENT
TOWSON, MARYLAND 21204
825-7310

PAUL H. RENCKE
CHIEF

March 19, 1981

Mr. William Hammond cc: Walter Reiter
Zoning Commissioner Chairman of Board of Appeals
Office of Planning and Zoning
Baltimore County Office Building
Towson, Maryland 21204

Attention: Nick Commodari, Chairman
Zoning Plans Advisory Committee

RE: Property Owner: Truman Grabill

Location: E/S Rolling Road 2,600 N. of Dogwood Road

Item No.: 21 Zoning Agenda: Meeting of March 16, 1981

Gentlemen:

Pursuant to your request, the referenced property has been surveyed by this Bureau and the comments below marked with an "X" are applicable and required to be corrected or incorporated into the final plans for the property.

☒ 1. Fire hydrants for the referenced property are required and shall be located at intervals or 500 feet along an approved road in accordance with Baltimore County Standards as published by the Department of Public Works. Fire hydrants at 500 foot intervals.

() 2. A second means of vehicle access is required for the site.

() 3. The vehicle dead end condition shown at _____

EXCEEDS the maximum allowed by the Fire Department.

() 4. The site shall be made to comply with all applicable parts of the Fire Prevention Code prior to occupancy or beginning of operation.

☒ 5. The buildings and structures existing or proposed on the site shall comply with all applicable requirements of the National Fire Protection Association Standard No. 101 "Life Safety Code", 1976 Edition prior to occupancy.

() 6. Site plans are approved, as drawn.

() 7. The Fire Prevention Bureau has no comments at this time.

REVIEWER: *Paul H. Rencke* Noted and Approved: *William Hammond*
Planning Group Fire Prevention Bureau
Special Inspection Division

/mb

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Mr. Walter Reiter
Board of Appeals Chairman Date: March 27, 1981
FROM: Mr. Charles E. Burnham
Plans Review Chief - Chief, Permits and Licenses
SUBJECT: Cycle I - 1981

RE: Cycle Zoning March 24, 1981

PROPERTY OWNER: Truman Grabill
LOCATION: E/S Rolling Road 2,600 N of Dogwood Road
EXISTING ZONING: D.R. 5.5
PROPOSED ZONING: D.R. 16
ACRES: 13.7
DISTRICT: 2nd

ITEM NO. 21

Permits for any improvements to the property shall be required. Sufficient plans and other data shall be provided to allow the permit to be processed.

NOTE: All comments are based on data provided on site plans and data provided by the Zoning Advisory Committee. Comments in many cases cannot be more specific or advisory due to the listed information.

Charles E. Burnham
Charles E. Burnham
Plans Review Chief

CEB:rrj
cc: Nick Commodari

Paul Lee, P.E.

Paul Lee Engineering, Inc.
206 Washington Avenue Towson, Maryland 21204 821-5941

DESCRIPTION

13.7 ACRE PARCEL, MORE OR LESS

EAST SIDE OF ROLLING ROAD

NORTH OF DOGWOOD ROAD

FIRST ELECTION DISTRICT

BALTIMORE COUNTY, MARYLAND

This Description is for Reclassification of Property
from a "DR 5.5" to a "DR-16" Zone

Beginning for the same at the intersection of the center line of Rolling Road at a point 220 feet, more or less, north of the south line of property recorded among the Land Records of Baltimore County in Liber 5186-315, said point of beginning being northerly 2600 feet, more or less, along the center line of Rolling Road from its intersection with the center line of Dogwood Road, thence leaving said center line of Dogwood Road the two following courses and distances (1) S 74 degrees E 255 feet, more or less, and (2) S 16 degrees W 195 feet, more or less, to intersect the south line of property recorded among the land records of Baltimore County in Liber 5186-315, thence binding on the south property line of the aforementioned deed (3) S 81 degrees 15 minutes E 900 feet, more or less, thence binding on the three following courses and distances (4) N 04 degrees 50 minutes W 12.7 feet, more or less, (5) N 05 degrees 10 minutes W 73.7 feet, more or less and (6) N 02 degrees 45 minutes E 373.9 feet, more or less, to intersect the south side of a private road 12 feet wide, known as Hidey's Lane,

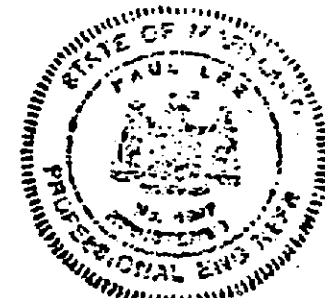
Engineers - Surveyors - Site Planners

thence ending on the south side of said private road westerly N 58 degrees 10 minutes W 795 feet, more or less, to a point located on the south side of the private road, then leaving said private road the two following courses and distances (7) S 20 degrees 38 minutes W 183 feet, more or less, and (8) N 69 degrees 22 minutes W 235 feet, more or less, to or near the center line of Rolling Road, said center line of Rolling Road also being the DR-16 zone line, as shown on Baltimore County Zoning Map NW 3G, thence binding on said zone line and on the center line of Rolling Road southerly 420 feet, more or less, to the place of beginning.

Containing 13.7 Acres of land, more or less.

PL:tl

March 29, 1978



Paul Lee, P.E.

494-3180

County Board of Appeals
Room 218, Court House
Towson, Maryland 21204

NOTICE OF ASSIGNMENT

Dec. 10, 1981

CONTINUED HEARING

NO POSTPONEMENTS WILL BE GRANTED WITHOUT GOOD AND SUFFICIENT REASONS. REQUESTS FOR POSTPONEMENTS MUST BE IN WRITING AND IN STRICT COMPLIANCE WITH BOARD RULE 2(b). ABSOLUTELY NO POSTPONEMENTS WILL BE GRANTED WITHIN FIFTEEN (15) DAYS OF SCHEDULED HEARING DATE IN ACCORDANCE WITH RULE 2(c), COUNTY COUNCIL BILL #108

CASE NO. R-82-80 TRUMAN GRABILL
For reclassification from D.R. 5.5 to D.R. 16
E/S of Rolling Road 2600'
N. of Dogwood Road
2nd District

ASSIGNED FOR: THURSDAY, JANUARY 7, 1982 at 10 a.m.

cc: Robert A. DiCicco, Esquire Counsel for Petitioner
Truman Grabill Petitioner
John W. Hession, III, Esq. People's Counsel
Mr. W. E. Hammond
Mr. J. E. Dyer
Mr. N. E. Gerber
Mr. J. G. Hoswell
Board of Education

Edith T. Eisenhart, Adm. Secretary

1st HEARING DAY

WEDNESDAY, DECEMBER 9, 1981

12/10/81 - Notified of CONTINUED HEARING set for THURSDAY, JAN. 7, 1982 at 10 a.m.

Robert A. DiCicco, Esq.
Truman Grabill
John W. Hession, III, Esq.
W. E. Hammond
J. E. Dyer
N. E. Gerber
J. G. Hoswell
Board of Education



BALTIMORE COUNTY
OFFICE OF PLANNING & ZONING
TOWSON, MARYLAND 21204
494-3353

December 3, 1981

WILLIAM E. HAMMOND
ZONING COMMISSIONER

Robert A. DiCicco, Esquire
208 W. Pennsylvania Avenue
Towson, Maryland 21204

RE: Petition for Re-classification
E/S Rolling Rd., 2,600' N of Dogwood Road
Truman Grabill - Petitioner
Case #R-82-80 Item #21

Dear Mr. DiCicco:

This is to advise you that \$80.50 is due for advertising and posting of the above property.

Please make check payable to Baltimore County, Maryland, and remit to Karen Riegel, Room 113, County Office Building, Towson, Maryland 21204 before the hearing.

Very truly yours,

WILLIAM E. HAMMOND
Zoning Commissioner

WEH:klr

Robert A. DiCicco, Esquire
208 W. Pennsylvania Avenue
Towson, Maryland 21204

November 12, 1981

NOTICE OF HEARING

E/S Rolling Rd., 2,600' N of Dogwood Rd.
Petition for Re-classification
Truman Grabill - Petitioner
Case #R-82-80

TIME: 10:00 A.M.

DATE: Wednesday, December 9, 1981

PLACE: Room 218, Courthouse, Towson, Maryland

William T. Hackett
William T. Hackett, Chairman
County Board of Appeals

ROBERT A. DICICCO
KENNETH F. DAVIES

Law Office
ROBERT A. DICICCO

405 CENTRAL AVENUE
TOWSON, MARYLAND 21204

TELEPHONE
AREA CODE 301
825-2000

January 6, 1982

Ms. Karen Riegel
Room 113
County Office Building
Towson, Maryland 21204

Re: Petitioner for Re-Classification
E/S Rolling Road,
Truman Grabill, Petitioner
Case #R-82-80 - Item #21

Dear Ms. Riegel:

Enclosed is my check in the amount of \$80.50 due for advertising on the above case.

Very truly yours,

ROBERT A. DICICCO

D/dp

BALTIMORE COUNTY, MARYLAND
OFFICE OF FINANCE - REVENUE DIVISION
MISCELLANEOUS CASH RECEIPT

No. 104519

DATE 1/12/82 ACCOUNT 01-662

AMOUNT \$80.50

RECEIVED FROM Robert A. DiCicco

FOR Posting & Advertising of Case #R-82-80 (Grabill)

501 000 13 805000

VALIDATION OR SIGNATURE OF CASHIER

501 000 13 805000
12/12/81
12/12/81
12/12/81

ROBERT A. DICICCO
KENNETH F. DAVIES

Law Office
ROBERT A. DICICCO

405 CENTRAL AVENUE
TOWSON, MARYLAND 21204

TELEPHONE
AREA CODE 301
825-2000

December 23, 1981

Office of Planning and Zoning
Room 113
County Office Building
Towson, Maryland 21204

Attention: Karen Riegel

Re: Truman Grabill, Petitioner
Case #R-82-80

Dear Ms. Riegel:

Enclosed is my client's check in the amount of \$51.31 in payment of the enclosed bill.

Very truly yours,

ROBERT A. DICICCO

D/dp

Enclosures

BALTIMORE COUNTY, MARYLAND
OFFICE OF FINANCE - REVENUE DIVISION
MISCELLANEOUS CASH RECEIPT

No. 102698

DATE 12/29/81 ACCOUNT 01-662

AMOUNT \$51.31

RECEIVED FROM T. Franklin Grabill

FOR 2nd full page add for Case #R-82-80

501 000 13 513100

VALIDATION OR SIGNATURE OF CASHIER

PAID TO PETITIONER
12/23/81
12/23/81
12/23/81

Re: Truman Grabill, Petitioner
#R-82-80
CBA Hearing Wed., Dec. 8, 1982, 10 am.

ITEM NO. 21

PROPERTY OWNER: Truman Grabill
LOCATION: E/S of Rolling Road, 2,600' N. of Dagwood Road
ELECTION DISTRICT: 2
COUNCILMANIC DISTRICT: 3
RECOMMENDED DATE OF HEARING: Week of December 7, 1981
ACREAGE: 13.7
GEOGRAPHICAL GROUP: None
FUNCTIONAL CATEGORY: None

ZONING PRIOR TO ADOPTION OF 1980 COMPREHENSIVE ZONING MAP: D.R. 16
EXISTING ZONING: D.R. 5.5
REQUESTED ZONING: D.R. 16

PLANNING BOARD RECOMMENDATION: Retain Existing Zoning (D.R. 5.5)

The subject property, containing a single-family dwelling and farm buildings, is located on the opposite side of Rolling Road from a townhouse apartment development on D.R. 16 zoned land. For the most part, adjacent properties located on the same side of Rolling Road are zoned D.R. 5.5 and are either in farm use or contain single-family dwellings. One portion of the subject site abuts a vacant tract zoned ML-IM. The petitioner is requesting a change from D.R. 5.5 to D.R. 16 zoning and has chosen to submit plans that do not show a proposed use of the property.

Prior to the adoption of the 1980 Comprehensive Zoning Map, this property was zoned D.R. 5.5. A petition requesting a similar change in zoning was filed in 1978 (see Cycle III, Item 4; Zoning Petition No. 77-54-R). On September 21, 1978, the Zoning Commissioner denied this request; on November 6, 1979, the County Board of Appeals granted this request for D.R. 16 zoning; on December 7, 1979, this decision was appealed to Circuit Court. The zoning of this property was a specific issue before both the Planning Board and the County Council during the 1980 Comprehensive Zoning Map process (No. 3-2); both the Planning staff and Planning Board recommended D.R. 5.5 zoning here. Finally, prior to adjudication by the Circuit Court, the County Council adopted the 1980 Comprehensive Zoning Map, placing the subject property in the D.R. 5.5 zoning classification.

The Bureau of Engineering's representative on the Zoning Advisory Committee stated, in part, that the petitioner's plan "does not indicate the proposed method of providing public sanitary sewerage to this site, which will require off-site right-of-way."

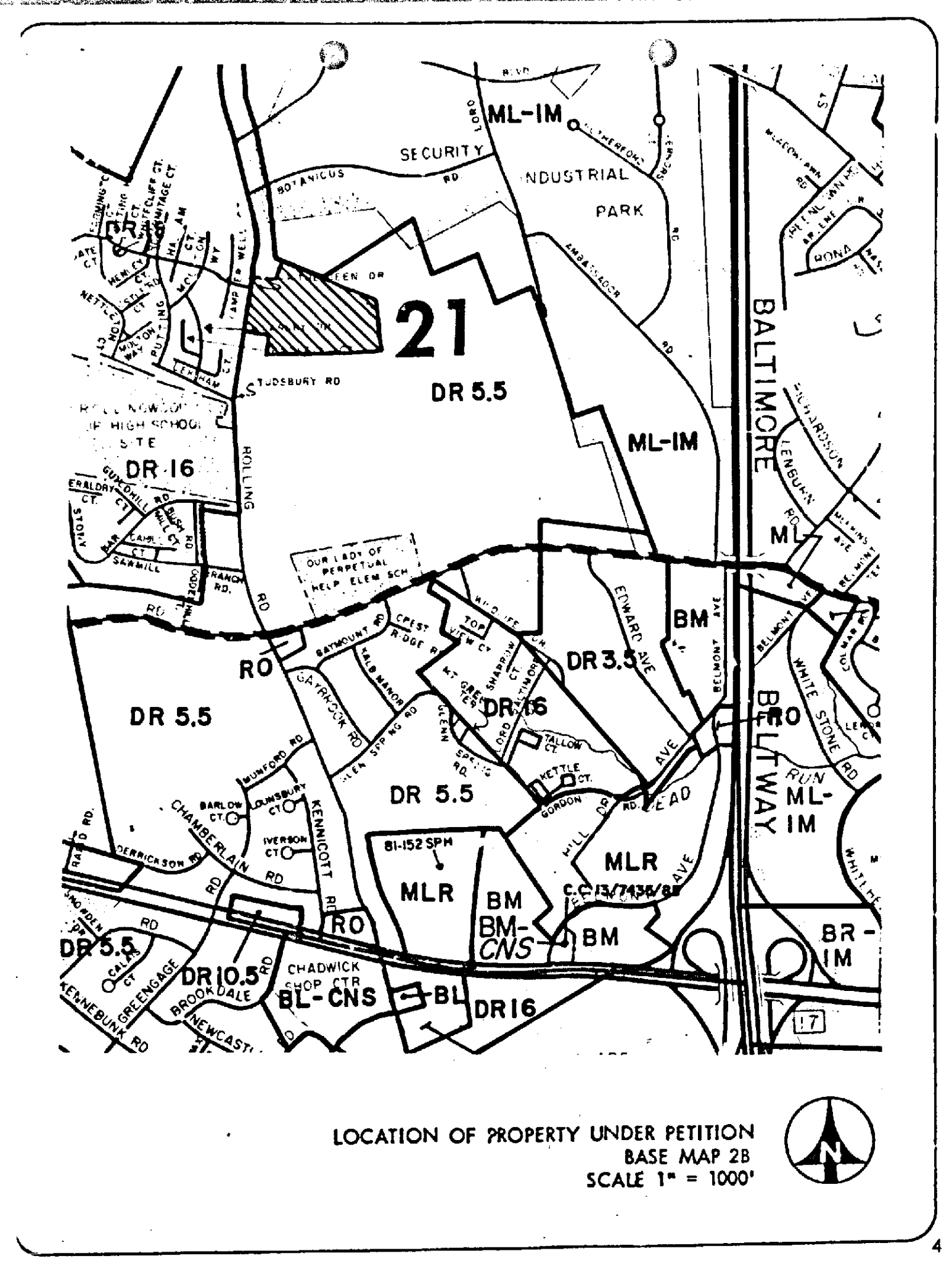
The Department of Traffic Engineering's representative on the Zoning Advisory Committee stated, in part, that, as presently zoned, development of the subject property would generate approximately 750 trips per day; were the petitioner's request granted, development would generate approximately 1,540 trips per day. Further, he stated that "the existing road system and the proposed improvements cannot be expected to adequately accommodate the development taking place with existing zoning in the area. A higher class of zoning can only add to the problem."

The Planning Board believes that D.R. 5.5 zoning is appropriate here, and that the zoning map is correct. It is the opinion of the Board that D.R. 16 would not be in character with the existing development of the adjacent properties along this side of Rolling Road; i.e., single-family dwellings and farm land. Further, the Board believes that the granting of this petition could precipitate additional increases in intensity of development in the area.

It is therefore recommended that the existing zoning, D.R. 5.5, be retained.

RECEIVED
BALTIMORE COUNTY
JUL 16 11 22 AM '82
COUNTY CLERK
COMMUNICATIONS

EXHIBIT C



Baltimore County, Maryland
PEOPLE'S COUNSEL
RM. 223, COURT HOUSE
TOWSON, MARYLAND 21204

JOHN W. HESSIAN, III
People's Counsel
PETER MAX ZIMMERMAN
Deputy People's Counsel

December 21, 1982

RE: TRUMAN GRABILL, Petitioner
Circuit Court File #82-M-143

The Honorable
Austin W. Brizendine, Judge
Circuit Court for Baltimore County
Courts Building
Towson, Maryland 21204

Dear Judge Brizendine:

In connection with our pending Motion under Maryland Rule B.12, as promised, enclosed is the decision of the Court of Special Appeals (Wilner, J.) in People's Counsel v. Public Service Commission, et al (No. 231, September Term 1982). This reported case of the Court of Special Appeals is the first to review revised Maryland Rule B.12. We direct your attention to pages 1-6 of the Opinion and await your instruction as to further proceedings.

We are also providing a copy to Mr. DiCicco.

Very truly yours,
Peter Max Zimmerman
Deputy People's Counsel

Enclosure
cc: Robert A. DiCicco, Esquire
PMZ:sh

RECEIVED
BALTIMORE COUNTY
DEC 21 1 17 PM '82
COUNTY CLERK
COMMUNICATIONS

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND
No. 231
September Term, 1982

PEOPLE'S COUNSEL
v.
PUBLIC SERVICE COMMISSION
ET AL

Lowell Wilner, Jr.
JJ.

Opinion by Wilner, J.

Filed: November 5, 1982

People's Counsel to the Public Service Commission pursues this appeal from an order of the Commission granting a rate increase to taxicabs operating in Baltimore City. His complaint is that, in deciding to grant the increase, the Commission looked at only one item of expense -- the cost of gasoline -- and did not consider the overall financial condition of the taxicab companies. As a result, he says, the Commission failed to act in accordance with Md. Code Ann. art. 78, §§ 69 and 84, and passed an order "that is without statutory authority, arbitrary and capricious, made upon unlawful procedure, and unsupported by substantial evidence on the record considered as a whole."

These arguments were presented to the Circuit Court of Baltimore City without success. The Commission believes that the lower court acted properly in rejecting People's Counsel's complaint. In a cross-appeal, it argues also that, because People's Counsel failed to comply with Maryland Rule B12 in prosecuting his appeal to the Circuit Court, that court should never have entertained the appeal in the first place. We shall affirm the judgment entered below.

(1) Commission's Cross-Appeal

The Commission's order, from which the initial appeal was taken, was issued December 11, 1980. People's Counsel took his appeal to the Circuit Court of Baltimore City on January 8, 1981, by sending to the clerk of that court an order for appeal and a "Petition On Appeal." See Maryland Rule B2. Presumably in an attempt to comply with Maryland Rule B7a, the Commission's

Executive Secretary, on February 2, 1981, sent the record in the case to:

"Mr. Elmer O. Harris, Clerk
Circuit Court of Baltimore City
Room 425, Civil Court Building
111 N. Calvert Street
Baltimore, Maryland 21202"

Mr. Harris was not the clerk of the Circuit Court; nor was Room 425 the office of that court. Mr. Harris was the clerk of the Baltimore City Court, and Room 425 was the office of the clerk of the Baltimore City Court. Notwithstanding that the Executive Secretary's covering letter clearly noted that the case was docketed in the Circuit Court (and even made reference to the correct docket and file numbers), Mr. Harris or one of his assistants redocketed the appeal in the Baltimore City Court and proceeded to recaption all of the pleadings accordingly.

The next day -- February 3, 1981 -- Mr. Harris sent to People's Counsel a "Notice Sent In Accordance With Maryland Rule B-12," advising that on February 3 he had received "from the Administrative Agency, the record in the above captioned case." The case was captioned properly in all respects save one: It showed the case as being in the Baltimore City Court.

People's Counsel made no response to the clerk's notice. On February 6, the Commission and "The Taxicab Owners of Baltimore City" filed answers, in the Circuit Court, to the appeal. On March 13, 1981, the Commission moved, in the Baltimore City Court, to dismiss the appeal on the ground that it was

filed in the wrong court. With the consent of all parties, Judge Albert Sklar remedied that problem by transferring the case to the Circuit Court where, in accordance with Md. Code Ann. art. 78, § 91, the case belonged.

On April 3, 1981, the Commission struck again at the appeal, moving to dismiss because of People's Counsel's failure to file a memorandum of law within thirty days of the clerk's February 3 notice, as required by Maryland Rule B12. People's Counsel, with justifiable embarrassment, responded that he had failed to comply with the rule because he was unaware of it. He argued in mitigation, however, that (1) the rule was a new one, having taken effect on January 1, 1981; (2) it had not, as of then, been published in Vol. 9C of the Maryland Code, where the other rules are located; (3) the notice in any event was a nullity since it was sent by a clerk who had no jurisdiction over the case; (4) the Commission was not prejudiced by the lapse; and (5) dismissal of the appeal was an unnecessarily harsh sanction. The required memorandum of law was filed with that response on April 10, 1981.

The court denied the Commission's motion. Acknowledging that the memorandum was thirty-nine days late, the court noted:

"[I]t is also true that this Rule became effective a little more than one month before the said 30 day period began to run. Appellant should have been more diligent in apprising himself of the Rules of Procedure; but the imposition of the ultimate sanction of dismissal appears too harsh under the particular facts and circumstances present here."

Carefully ignoring its own negligence in transmitting the record to the wrong person (thereby violating its duty under

Maryland Rule B7), the Commission continues to play "hardball" with People's Counsel by analogizing Maryland Rule B12 to other rules specifying time limits and insisting that the Circuit Court had an absolute duty to dismiss the appeal.

Before commenting on the Commission's argument, we should take note of the rule itself.

Maryland Rule B12, which is part of the rules governing appeals from administrative agencies, provides, in relevant part, that:

"Within 30 days after being notified by the clerk of the filing of the record, the appellant shall file a memorandum setting forth a concise statement of all issues raised on appeal and argument on each issue, including citations of legal authorities and references to pages of the transcript and exhibits relied on."

The rule, patterned after a local second circuit (upper Eastern Shore) rule, was formally adopted by the Court of Appeals on October 1, 1980, to become effective, along with a number of other new and amended rules, on January 1, 1981. Notice thereof was given in the Maryland Register on October 17, 1980 (7:21 Md.R. 1975, 1980).

It has often been said that the Rules of Procedure adopted by the Court of Appeals "are not guides to the practice of law but precise rubrics 'established to promote the orderly and efficient administration of justice and [that they] are to be read and followed.'" *Countess v. State*, 286 Md. 444, 463 (1979), quoting from earlier cases. It has also been made clear that when such a rule says that something "shall" be done, the Court jolly-well means for it to be done; the direction is a "mandatory"

one and must be obeyed. Cf. In Re James S., 286 Md. 702 (1980), involving a statutory time requirement.

Maryland Rule B12 is such a rule. It is a "precise rubric" adopted by the Court "to promote the orderly and efficient administration of justice," and it is meant to be obeyed. But the rule does not specify or mandate any particular sanction for its violation.

It is true, as the Commission points out, that the appellate courts in this State have, on frequent occasion, dismissed proceedings or otherwise precluded the admission of evidence or the consideration of issues because of a litigant's failure to comply with mandatory time or procedural requirements. See, for example, Salisbury Bd. v. Bounds, 240 Md. 547, 553 (1965); Warmack v. Bradley Club, 242 Md. 394 (1966); Jacobson v. High Hill Realty, Inc., 22 Md.App. 115, cert. den. 272 Md. 743 (1974), and cases cited therein; Laukenmann v. Laukenmann, 17 Md.App. 107 (1973); State v. Hicks, 295 Md. 310, and on reconsideration 285 Md. 334 (1979).

In some instances, the applicable rules either require or expressly permit an extreme sanction for violation of the procedural requirements which they or other rules establish. See, for example, Maryland Rules 835, 1035, B5. In other cases, the rules provide either no specific sanction or offer a range of alternative sanctions, in which event the courts have tended to balance the purpose and importance of the requirement against the circumstances of its violation. State v. Hicks, supra was such a case, as was In Re Dewayne H., 290 Md. 401 (1981).

We would regard dismissal of an administrative appeal as an appropriate, and perhaps even a preferred, sanction for failure to comply with Maryland Rule B12; but we do not believe that it is a mandatory sanction required to be applied indiscriminately in all cases. The trial court, we think had some discretion in the matter. The time period specified in the rule is not jurisdictional in nature, and we regard it of some significance that, in light of the controversy surrounding its more or less contemporaneous decision in Hicks (and Johnson v. State, 282 Md. 314 (1978)), the Court of Appeals chose not to specify dismissal as a required sanction.

There is no evidence in this record that either the court or the Commission was seriously inconvenienced, much less prejudiced, by People's Counsel's lateness in filing the memorandum of law. The rate increase remained in effect pending the appeal. Given the newness of the rule, its limited publication, and the Commission's own dereliction in transmitting the record to the wrong court, we do not believe that the court abused its discretion in declining to dismiss the appeal.

(2) People's Counsel's Appeal

Having won the procedural battle, People's Counsel will now proceed to lose the war.

The jurisdiction and powers of the Public Service Commission extend to all public service companies operating a utility business, to the full extent permitted by the Constitution and laws of the United States. Md. Code Ann. art. 78, §§ 1, 23. The Commission is authorized, and obliged, by § 56 of

art. 78, to

"supervise and regulate all public service companies subject to its jurisdiction to assure their operation in the interest of the public and to promote adequate, economical, and efficient delivery of utility services in the State without unjust discrimination, giving consideration to the public safety, the economy of the State, the conservation of natural resources, and the preservation of environmental quality." (Emphasis supplied.)

A major component of the Commission's overall regulatory authority is the power conferred by § 68(a) of art. 78 "to determine just and reasonable rates of public service companies, whether as maximum, minimum[,] or maximum and minimum, respectively." Section 69(a) defines "just and reasonable rates" as those

"which are not in violation of any of the provisions of this article [78], which fully consider and are consistent with the public good, and which will result in an operating income to the public service company... yielding, after reasonable deduction for depreciation and other necessary and proper expenses and reserves, a reasonable return upon the fair value of the company's property used and useful in rendering service to the public."

If a public service company proposes a new rate, the Commission may suspend it and institute "proceedings as to the justice and reasonableness of the rate suspended." Section 70(a) and (b). Under § 71(a), the Commission may also, after "due hearing," fix temporary rates for a public service company that are either higher or lower than those currently in effect. Such action may be taken only if

"(1) the Commission finds pending a final rate proceeding, that the rates in force are either higher or lower than just and reasonable rates as defined in § 69 of this article and (2) the Commission finds that such temporary rates are necessary in the interest of justice in view of the length of time which must elapse before a final order can be entered."

A great deal of discretion is necessarily vested in the Commission in order that it may properly discharge its important and complex duties. Commission decisions are presumptively correct, and, though subject to judicial review, they are to be affirmed unless found to be illegal or unsupported by substantial evidence. See art. 78, § 97; Williams v. Public Service Comm'n, 277 Md. 415 (1976); Public Serv. Comm'n v. Balto. Gas & El., 273 Md. 357 (1974). A reviewing court may not substitute its judgment for that of the Commission, and indeed it "should not examine the facts in any case further than to determine whether there was substantial evidence to sustain the order." Sports Daily v. Public Service Comm., 179 Md. 355, 365 (1941); see Crisfield v. Public Service Comm., 183 Md. 179, 185 (1944).

The Legislature, in its wisdom, has chosen to regard taxicabs as public service companies subject to Commission jurisdiction. See art. 78, § 2(o) defining "public service company" as including a "common carrier company" and § 2(d) defining "common carrier" as including a "taxicab company." See also § 2(w) defining "taxicab." Each taxicab must be separately licensed, and each licensee, whether an individual

or other legal entity, is regarded as a separate taxicab company and thus a separate public service company. See art. 78, § 45, and cf. Albert v. Pub. Serv. Commission, 209 Md. 27 (1956).

There are approximately 1,150 licensed taxicabs operating in Baltimore City. Some of the licensees drive their own cabs; most do not. In the majority of cases, according to the record, the licensees employ drivers on a contract basis, these drivers (in Baltimore City) being separately licensed as taxicab drivers by the Commission. See art. 78, §§ 50A, et seq. Most of the taxicab licenses in the City are held by people or companies who have become part of a larger group or association and identify their cabs with the association name -- Yellow Cab, Arrow Cab, Checker Cab, etc.

The Commission historically has treated all these licensees as a group for rate-making purposes. Rather than determine a "just and reasonable rate" for each cab based upon each licensee's income, expenses, assets, and liabilities (which would entail 1,150 separate rate cases and likely produce hundreds of different rates), the Commission has established a uniform schedule of rates for all licensed cabs in the City. That is not, of course, the approach taken with respect to other utilities, where the public service companies tend to be much larger but far fewer in number and are required to justify individual rate schedules. The validity and reasonableness of the Commission's general approach to regulating

taxicab rates is not challenged in this appeal.

In November, 1979, after a full rate hearing, the Commission approved a new rate schedule for the licensed cabs in Baltimore City (Case No. 7342, Order No. 64098). The new rates, which permitted a charge of eighty cents for the first one-sixth of a mile, were based on financial data for the twelve-month period ending March 31, 1979.

On May 16, 1980, entities holding 895 of the 1,151 licensed cabs in the City petitioned for both a temporary and a permanent rate increase, seeking to charge an additional twenty cents (\$1.00) for the first one-sixth of a mile. The basis of their request was that, since the November order, "the cost of taxicab vehicles, gasoline, oil, materials, parts, tires, labor, maintenance, liability insurance and other insurance and costs have increased substantially, and the operations are increasingly continuing with large losses."

At the hearing conducted on the request for temporary rates, it was made clear that the entire twenty-cent increase was necessitated by an increase in gasoline prices and would be passed on, in its entirety, to the drivers. Evidence presented by the licensees showed that:

- (1) The prevailing practice in Baltimore City was for the drivers, who were employed as independent contractors by the licensees, to pay for the cost of gas used on their shifts;
- (2) Since March, 1979, the price of unleaded gasoline used by the cabs had increased by an average of 67% -- from

76.5 cents/gallon to \$1.27/gallon;

(3) On the average, that increase represented an additional cost to the driver of about \$6.00 per shift;

(4) As a result, many drivers had either quit or reduced their hours, thus idling a number of cabs and reducing the overall cab service in the City; and

(5) Assuming an average of twenty-five trips per shift, the additional twenty-cent fare would bring the driver \$5.00 more per shift, thus helping to offset the \$6.00 increase in gasoline cost.

Upon the assurance that the entire twenty-cent increase would be passed through to the drivers, and that no attempt would be made by the licensees to recoup any part of it through rental increases, the Commission, on June 13, 1980, passed an order (No. 64336) authorizing each licensee in the City "to collect a temporary surcharge of twenty cents (\$.20) per trip, in addition to the metered fare, for taxicab service furnished in Baltimore City, Maryland."

On October 21, 1980, a hearing was conducted before a Commission hearing examiner (see art. 78, §§ 16(b), 20(b)) on the request for permanent increase. Without objection, "all of the exhibits and all of the testimony and the findings at the hearing in the temporary rate case" were judicially noticed and "merged into this case." Essentially the same evidence was presented again by the licensees, only in somewhat greater detail. Gasoline costs had dropped a little since May, but were still about 57% greater than in March, 1979. Drivers

faced with that increased expense, had either quit altogether or reduced their hours of work. As a result, shifts were down and overall revenues to the licensees had declined. The goal of the requested increase was to bring the drivers back, increase the shifts, and in that way improve the efficiency and profitability of the licensees' operations. Once again, it was proffered that the entire increase would be passed through to the drivers, and that none of it would be retained, or recouped, by the licensees.

The petitioners presented very little specific information about their own financial affairs and condition, apparently on the theory that, since the entire increase would be retained by the drivers, their financial status was not relevant. Such a theory, as People's Counsel rightly complains, is most certainly not a valid one. It is the licensees, not the drivers, who charge and must justify the new rates; and it is their financial condition, not that of the drivers, which is most relevant. The mere fact that one item of expense -- gasoline -- has increased would not, of itself, justify a rate increase, especially in the absence of evidence indicating an inability of the licensees to adjust their contract with the drivers and, directly or indirectly, absorb that increase. This is the crux of People's Counsel's appeal, and it is a matter also noted by the Commission's hearing examiner.

The fact is, however, that the record does contain evidence regarding the overall financial condition of the

licensees; and it is on that basis that we shall affirm.

At least two witnesses -- Mr. Joseph on behalf of the Sun and Checker cabs and Mr. Granat on behalf of the Arrow cabs -- testified that since 1979 their overall costs had increased and, because of reduced shifts, their revenues had declined. Mr. Joseph stated that since 1979 "[t]he shifts have been down," "[r]evenues have been reduced," and "[t]he cost of gasoline has gone up, auto parts has [sic] gone up, general overhead has gone up." Yellow Cab Co., he said, was "in a worse financial position in the first eight months of 1980 than it was in the first eight months of 1979." Mr. Granat presented similar testimony with respect to Arrow cabs: "Well, I can state without any hesitation that the revenues and the net end of the operation has been substantially reduced over 1979." An exhibit prepared by Granat showed that, for his association, net profits for the first eight months of 1980 had declined by \$20,000 (from \$97,000 to \$77,000) from the corresponding period in 1979, and that the average profit per cab was only \$891 for that eight-month period.

The hearing examiner decried the lack of better evidence, but nonetheless found:

"The limited evidence on the record in this case indicates that the cost of providing taxicab service has increased. While the evidence concerning the rise in the cost of gasoline can be viewed industry-wide, the testimony from representatives of two taxicab associations -- that owner revenues have decreased because of a reduction in the number of shifts being driven -- can only be inferred for the rest of the industry. The Hearing Examiner believes, however, that this is a reasonable inference.

The fare increase proposal would produce no increase in the owners' per-shift revenue; the increase in revenues would go to the drivers to help defray the higher cost of gasoline. Like other public services, taxicab fares should reflect the cost to provide the service. Accordingly, based upon the overall evidence, the proposed fares will be authorized so that the increased revenues will go to the driver to help defray the cost of gasoline. Increased revenues for the drivers, it is anticipated, will also improve the utilization of idle cabs (to the extent that underutilization exists) to the benefit of the riding public. ..."

On appeal, the Commission adopted the examiner's recommendations, finding:

"The record in this proceeding indicates that the requested increase in fares would produce no increase in the owners' per-shift revenue, but would be retained by the taxicab drivers to offset their cost of gasoline. We find that the evidence supports an increase in fares to cover the higher cost of gasoline which, in turn, increases the cost of providing taxicab service in the City of Baltimore."

The weight to be accorded the kind of evidence presented at the two hearings, unsupported by audited financial statements, was for the Commission to determine. It was entitled to believe that Messrs. Joseph and Granat knew whereof they spoke and were presenting an accurate depiction of the current financial condition of the licensees. If, indeed, overall expenses were up and revenues were down, the licensees would not be in a position to defray the increased cost of gasoline.

In short, People's Counsel's assertion that "the applicants failed to present any evidence at all regarding the financial condition of their companies and sought an increase

by the simple process of establishing the fact that gasoline prices had risen" (Brief, p. 6) is simply not supported by the record. There was such evidence presented. It was scanty and largely undocumented; but it was there.

JUDGMENT AFFIRMED;
APPELLANT TO PAY THE COSTS.

John Adams - 494-2860
Chief Assignment Commissioner
Settlement Court
Kathy Ruston - 494-2862
Medical Records Clerk
Medical Records Clerk

ASSIGNMENT OFFICE
COUNTY COURTS BUILDING
401 Boley Avenue
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Oct. 5, 1982

Sandy Sanders - 494-2860
Assignment - Jury - Motions
Freddie Grove
Assignment Clerk Typist
Irene Summers - 494-2861
Assignment - Non-Jury - Motions
Marta Eickling
Assignment Clerk Typist

RE: M - 82 M 143 - The Peoples Counsel for Balt. Co., Truman Grabill vs County Board of Appeals of Baltimore

HEARING DATE: Tuesday, Dec. 14, 1982, @ 9:30 a.m.

ON THE FOLLOWING: Appeal 1 hour

Notes corrected notice.

UPON RECEIPT OF THIS NOTICE: Counsel shall contact each other immediately to conform calendar claim of not receiving notice will not constitute reason for postponement.
POSTPONEMENTS: If the above date is not agreeable to any counsel, a request for a postponement MUST BE MADE IN WRITING to the Assignment Office AS SOON AS POSSIBLE, with a copy to all counsel involved. POSTPONEMENTS WITHIN 15 DAYS OF TRIAL must be made to the attention of the Director of Central Assignments - Joyce Grimm - 494-3897.
SETTLEMENT CONFERENCES: All counsel must secure the attendance of all parties necessary to effect a binding settlement, including clients and insurance representatives. THERE WILL BE NO EXCEPTIONS PER ORDER OF JUDGE FRANK E. CROONE. Please direct all inquiries to the attention of John Adams.

SETTLEMENTS: If a settlement is reached prior to the hearing date, the Assignment Office must be notified immediately.

RECEIVED
COUNTY BOARD OF APPEALS
OCT 15 1982

494-3180

County Board of Appeals

Room 209, Court House
TOWSON, MARYLAND 21204

August 12, 1983

Mr. Julius A. Romano
Clerk of the Court of Special Appeals of Maryland
Annapolis, Maryland 21404

Re: Truman Grabill
Circuit Court File 14/148/82-M-143

Dear Mr. Romano:

Please forward to this office a copy of the opinion in the above entitled case when it is filed by the Court of Special Appeals. We would appreciate it if you would note our request in your file on this case. Thank you.

Very truly yours,

Edith T. Eisenhart
Edith T. Eisenhart, Adm. Secretary

UNREPORTED IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 801

September Term, 1983

R-82-80

TRUMAN GRABILL

v.

PEOPLE'S COUNSEL FOR
BALTIMORE COUNTY

Carrity
Bloom
Bell

JJ.

PER CURIAM

Filed: April 26, 1984

RECEIVED
COUNTY BOARD OF APPEALS
OCT 15 1983

CIRCUIT COURT FOR BALTIMORE COUNTY

ASSIGNMENT OFFICE
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401 Boley Avenue
P.O. Box 6754
Towson, Maryland 21204-0754
January 20, 1983

John Adams - 494-2860
Chief Assignment Commissioner
Settlement Court
Marta Eickling - 494-2862
Medical Records Clerk
Medical Records Clerk

TO: John V. Bastian, III, Esq.
Peter Max Zimmerman, Esq.
Robert A. McIlroy, Esq.
James Holman, Esq.
Thomas J. Dollinger, Esq.

RE: M - 82 M 143 - THE PEOPLES COUNSEL FOR BALTO. CO. vs AL VS COUNTY BOARD OF APPEALS

HEARING DATE: Tuesday, April 5, 1983, @ 9:30 a.m.

ON THE FOLLOWING: Appeal 1 hour

Notes corrected notice.

UPON RECEIPT OF THIS NOTICE: Counsel shall contact each other immediately to conform calendars. Claim of not receiving notice will not constitute reason for postponement.
POSTPONEMENTS: If the above date is not agreeable to any counsel, a request for a postponement MUST BE MADE IN WRITING to the Assignment Office AS SOON AS POSSIBLE, with a copy to all counsel involved. POSTPONEMENTS WITHIN 15 DAYS OF TRIAL must be made to the attention of the Director of Central Assignments - Joyce Grimm - 494-3897.

SETTLEMENT CONFERENCES: All counsel must secure the attendance of all parties necessary to effect a binding settlement, including clients and insurance representatives. THERE WILL BE NO EXCEPTIONS PER ORDER OF JUDGE FRANK E. CROONE. Please direct all inquiries to the attention of John Adams.

SETTLEMENTS: If a settlement is reached prior to the hearing date, the Assignment Office must be notified immediately. All settlements must be put on the record if no order of satisfaction is filed prior to trial.

RECEIVED
COUNTY BOARD OF APPEALS
OCT 15 1983

The Baltimore County Board of Appeals (Board) granted Truman Grabill's (Grabill) Petition for Zoning Reclassification for his 13.7 tract of farmland in Baltimore County from D.R.5.5. (Density Residential, Maximum 5.5 Units Per Acre) to D.R. 16 (Density Residential, Maximum 16 Units Per Acre). The Board in granting the Petition found that the Baltimore County Council had erred in its designation of the subject property as D.R. 5.5 on the 1980 Comprehensive Zoning Map. The Circuit Court for Baltimore County reversed, holding that the Board had erroneously substituted its judgment for that of the County Council.

On appeal, Grabill asks us to hold that (I) the trial court erred in substituting its judgment for that of the Board where the evidence before the Board presented a fairly debatable issue that the County Council committed error when it zoned the subject tract D.R. 5.5 instead of D.R. 16; and that the D.R. 5.5 zoning determination by the County Council amounted to an unconstitutional confiscation because the property could not reasonably be developed in that classification. We decline to so hold and affirm the judgment below.

FACTS

The case at bar is not a stranger to the judicial process. There have been two reviews of this matter before

There is some dispute as to the character of the surrounding area. Grabill describes the site as bounded on the north and east by the 280 acre Security Industrial Park with industries including Baltimore Gas & Electric Company, the F.B.I., Barre International Corporation, C & P Telephone Company, Eastman Kodak, MCEEA and offices at the Rutherford Plaza Office Center. People's Counsel maintains that the neighborhood generally to the north of the site contains a mix of town-houses, apartments, and single family homes on land zoned residential, as well as a portion of the Security Industrial Park.

The property is bounded on the south, according to Grabill, by the Security Square Mall, a major regional shopping center and two national motel chains, another 55 acre industrial office park and an extensive apartment complex, Quail Meadows. People's Counsel described the southern perimeter of the property as largely vacant land zoned D.R.5.5, with the exception of an elementary school and a church on the north side of Dogwood Road, a new subdivision of 12 single family homes, called Hanna Woods, and an approved tentative subdivision plan and public works agreement for the "Walling Ford" development comprising 226.6 units located at the northeast

He also related to the Board that in his opinion, D.R. 5.5 was an improper zone for the tract because it was bounded on one side by an industrial zone and on another by high density residential.

Grabill himself appeared and recited to the Board his reasons for seeking reclassification, claiming that the property was no longer suitable for single family residence or farming. He valued his property at \$540,000..

Frederick P. Klaus, a real estate expert who had been involved with development in the vicinity of the site, testified that in his opinion, error occurred when the County Council failed to learn the extent to which the Board considered the site previously. He stated that the development cost at D.R.5.5, whether the \$9,100 figure suggested by Paul Lee or the \$7,000 figure offered by the Board itself, was too prohibitive for D.R.5.5 residential use. He estimated that normal per unit development cost was \$3,500.

Witness Virginia Appleby, a neighbor, appeared in support of the petition. She had just sold her property zoned D.R.5.5.

People's Counsel first witness was engineer and consultant J. Carroll Hagan. Mr. Hagan reviewed Paul Lee's estimates and found them reasonable, noting that

presented some evidence that the Council had before it information of the previous Board of Appeals action and circuit court action.

In addition, People's Counsel introduced into evidence an October 7, 1980 letter of Councilman James Smith indicating that the planning staff and Planning Board recommended D.R.5.5 zoning, that the Council saw the property, agreed with the recommendation and that the Council "retired" the issue of Grabill's rezoning because it had received no further information on the issue.

The County Board of Appeals granted the Petition for Reclassification. The Board specifically found there was no issue of confiscation as the property could be developed within its present zoning. After noting that the case law supported both Grabill's position and that of the People's Counsel, the Board concluded that:

As a last resort the Board will refer to the motto displayed in our courtroom, 'Reason is the Life of the Law,' and in the subject case 'Reason' dictates that some transitional use should be provided between land being used as an industrial park and land zoned for what is normally considered single family residential use on single lots.

The Board ruled that the D.R.5.5 zoning on the subject parcel was in error and ordered its reclassification to the requested D.R.16 zoning.

in favor of this cyclical zoning system. Judge Davidson speaking for this Court held at page 370:

the system will enhance the stability and permanence of zoning classifications by assuring that the majority of zoning classifications are determined in accordance with a carefully integrated plan of development, based upon a full understanding of the present and future needs of a broad area, rather than a piecemeal review of a limited scope.

In this case, the subject property was considered as a specific issue in the 1980 map process. The County Council classified the property as D.R.5.5 in 1976 and reaffirmed that classification in 1980. It was within the Council's discretion to decide that the low density residential designation should remain the same as it was in 1976. Dahl v. County Board of Appeals of Baltimore County, 258 Md. 157, 265 A.2d 227 (1970).

Maryland courts have repeatedly recognized that there is a strong presumption of correctness accorded to legislative comprehensive zoning and rezoning. Howard County v. Dorsey, 292 Md. 351, 355, 438 A.2d 1339 (1982). To sustain a reclassification, there must be strong evidence of mistake in the comprehensive zoning or evidence of substantial change in the character of the neighborhood. Anne

tive action arbitrary, capricious, discriminatory or an unequal application of the law. Wakefield v. Kraft, 202 Md. 136, 142, 96 A.2d 27, 28-29 (1953) (Citations omitted). A decision of the zoning board based upon substantial evidence will be deemed "fairly debatable" and a court will not then substitute its judgment for that of the zoning board. The "fairly debatable" test is analogous to the "clearly erroneous" standard applied under Maryland Rules of Procedure 886 and 1086. Sedney v. Lloyd, 44 Md. App. 633, 410 A.2d 616 (1980).

Recently, Judge Rodowsky, writing for the Court of Appeals in United Steelworkers of America AFL-CIO, Local 2610 v. Bethlehem Steel Corp., No. 23 (decided March 9, 1984) elaborated on this standard for administrative review.

Judicial review of administrative action differs from appellate review of a trial court judgment. In the latter context, the appellate court will search the record for evidence to support the judgment, and will sustain the judgment for a reason plainly appearing on the record whether or not the reason was expressly relied upon by the trial court. However, in judicial review of agency action the court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency. Id. at 14-15. (Citations omitted).

In the case at bar, Grabill asserts he surpassed his evidentiary burden by demonstrating: (i) specific physical facts not readily discernible at the time of the comprehensive zoning - these facts include the presence of underground rock, the high cost of extending the sewer line to the premises and the high public development costs rendering the property unsuitable for D.R.5.5 development; (ii) the existence of facts not taken into account by the County Council - Grabill maintains that based on the letter of Councilman Smith and the Planning Staff and Planning Board Recommendation, the Council did not consider the viability of the transition or buffer theory in zone planning, sewer, water or storm drain information, the availability of public works and services and development cost information before classifying the property D.R.5.5; and (iii) the existence of facts occurring subsequent to the comprehensive zoning - namely, that the Council was, on July 15, 1980, when it rendered its decision, unaware of the circuit court affirmation of the 1976 reclassification to D.R.16 by the prior Board, citing the March 20, 1980 date as the last entry in the Planning Board log book submitted to the County Council.

Were we to search the record for substantial evidence to sustain Grabill's theories, we might conclude that the evidence was sufficient to overcome the presump-

so that the Council's action was premised on a misapprehension. Coppolino, 23 Md. App. at 372, 328 A.2d at 63.

Finally, Grabill offered testimony that the Council may have been unaware of the circuit court action on the 1976 rezoning petition when it retired the issue. This would not amount to substantial evidence for the sole reason that the 1976 reclassification is immaterial to the new 1980 classification by the County Council.

Thus, were we to review the evidence, we might find the record could have shown mistake. However, we are constrained on appeal to limit our review to the conclusions stated by the Board in its decision. The Board found that Grabill overcame the burden of presumption, proving the County Council had committed error. However, the Board reasoned so not because the property had underground rock or could not be developed at D.R.5.5 because of high cost, or because the Council was unaware of existing facts or because an unconstitutional confiscation had occurred (See Issue II, infra), but because the Board simply disagreed with the policy and judgment of the County Council. That is not their function, nor is it the function of the lower court or this Court to perform the legislative function the Baltimore County Code commits to the Baltimore County Council. The trial court did not err in reversing the Board of Appeals' ruling.